

Proposals for a Commission on the Accountability and Review of Federal Agencies (CARFA): Analysis and Issues for Congress

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Summary

In the 109th Congress, companion bills have been introduced (S. 1155/H.R. 2470) that, if enacted, would establish a Commission on the Accountability and Review of Federal Agencies (CARFA). Either version of the proposed CARFA Act would require this 12-member commission to review certain federal agencies and programs to determine if any are *duplicative, wasteful, inefficient, outdated, irrelevant, or failed*. The House version would include within the commission's scope only non-defense, non-entitlement agencies and programs in the executive branch, while the Senate version would include all executive branch agencies and programs, including the Executive Office of the President. The commission would be required or, in some cases allowed, to recommend that any such programs and agencies be realigned or eliminated. The commission's recommendations would be packaged into an implementation bill that would receive expedited congressional consideration. Nearly identical provisions appeared in a budget process reform bill (H.R. 2290) and a bill to offset costs from Hurricane Katrina and Hurricane Rita (S. 1928). In addition, nonbinding provisions in the FY2006 budget resolution (H.Con.Res. 95) called for enacting a CARFA-like commission. President George W. Bush said in his FY2006 budget that he would propose, as part of his President's Management Agenda (PMA), legislation authorizing him to propose "results commissions," which would consider and revise Administration proposals to restructure and consolidate programs and agencies. Proposals approved by such a results commission and the President would be considered by Congress under expedited procedures. The Administration suggested that the results commissions legislation would be similar to the CARFA proposal. Bills have been introduced (H.R. 3276/S. 1399) that largely incorporated the Administration's draft language.

Proponents have argued that, if enacted, a CARFA could evaluate programs and agencies, use a successful model for congressional consideration of commission recommendations, and thereby eliminate or reform wasteful agencies and programs. The Bush Administration has suggested that a CARFA should use the Administration's Program Assessment Rating Tool (PART). Critics might likely contend that the legislation is too narrowly focused—looking only at discretionary, non-defense programs (House version); that the commission should be equally balanced along partisan lines or less under the President's control; that expedited procedures undermine the democratic process; and that the decision making criteria are too subjective. This report summarizes the legislation's history and provisions, discusses other review commission legislation, and highlights perspectives about the CARFA proposal from the 108th Congress. Next, the report analyzes issues that may be of interest in the 109th Congress in the event that the CARFA legislation or similar proposals to establish a review commission are further considered. Finally, the report discusses potential success factors for commissions and potential alternatives or complements to a commission. A short version of this report is available (CRS Report RS21980, *Proposed Commission on the Accountability and Review of Federal Agencies (CARFA): A Brief Overview*). This report will be updated as events warrant.

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Introduction

In the 109th Congress, for the third consecutive Congress, companion bills have been introduced (S. 1155/H.R. 2470) that, if enacted, would establish a Commission on the Accountability and Review of Federal Agencies (CARFA).¹ As discussed later in this report, these two bills differ from one another in some key respects, including the procedure for appointing commission members, the agencies that would be within the proposed commission's scope, and requirements for use of "funds saved" as a result of the commission's plan and recommendations.² Nonetheless, if either version of the legislation is enacted, the proposed CARFA Act would require this "review commission," made up of 12 members, to review certain federal agencies and programs to determine if any covered agencies or programs are *duplicative, wasteful, inefficient, outdated, irrelevant, or failed*. The proposed CARFA would be required (or in some cases in the Senate version, allowed instead of required) to recommend that any such programs and agencies be realigned or eliminated. The commission's recommendations would then be packaged into an implementation bill that would receive expedited congressional consideration, including prohibitions on amendments and restrictions on procedural delays.

Provisions nearly identical to the House and Senate bills also appeared in a budget process reform bill (H.R. 2290, Subtitle III.C., providing for the establishment of a Commission to Eliminate Waste, Fraud, and Abuse) and a bill to offset costs of Hurricane Katrina and Hurricane Rita (S. 1928, Title III, providing for a CARFA). Nonbinding provisions in the FY2006 budget resolution (H.Con.Res. 95) also called for establishing a CARFA-like commission. Finally, President George W. Bush said in his FY2006 budget submission that he would put forward, as part of his President's Management Agenda (PMA), legislation authorizing him to propose "results commissions." These commissions would consider and revise Administration proposals to restructure and consolidate programs and agencies.³ Before the legislation's release, an Administration official from the Office of Management and Budget (OMB) suggested that the results commissions would be similar to the previously proposed CARFA. Proposals approved by such a results commission and the President would be considered by Congress under expedited procedures. Subsequently, the Bush Administration released a legislative proposal for results commissions and a sunset commission. Bills were later introduced (H.R. 3276/S. 1399) that substantially incorporated the Administration's draft language that would allow the establishment of results commissions.

This report analyzes several issues related to the CARFA legislation. The CARFA proposal's provisions for expedited congressional consideration have been compared by its proponents to those of the legislation that established the Base Closure and Realignment (usually known as "BRAC") commissions. The BRAC commissions have made recommendations to realign and close many military installations in the last 15 years. However, the CARFA proposal also has significant differences from the BRAC framework, as discussed later in this report. In addition,

¹ For a short version of this report, see CRS Report RS21980, *Proposed Commission on the Accountability and Review of Federal Agencies (CARFA): A Brief Overview*, by Clinton T. Brass.

² In contrast, in the 107th and 108th Congresses, the Senate and House companion bills were identical (S. 2488/H.R. 5090 and S. 1668/H.R. 3213, respectively, introduced by the same sponsors).

³ The President's FY2006 budget also said the President would propose the establishment of a "sunset" commission, which is not inside the scope of this report. A sunset proposal typically calls for systematic evaluation and, in addition, an action-forcing mechanism that carries the ultimate threat of program termination. For more on the Administration's sunset proposal and subsequent developments, see CRS Report RS22181, *A Sunset Commission for the Federal Government: Recent Developments*, by Virginia A. McMurtry.

OMB has testified to Congress that, if Congress established CARFA, the commission should use the Bush Administration's Program Assessment Rating Tool (PART) to evaluate programs.⁴ This report also briefly discusses the results commissions proposal, which appears similar in some respects to presidential reorganization authority, which lapsed in 1984 and has not been renewed by Congress.⁵ The results commissions proposal also appears similar in some respects to provisions that established BRAC commissions. Like BRAC, the results commissions proposal would provide for multi-stage review of reorganization plans (i.e., by the commission, the President, and Congress) and expedited congressional consideration.

The first section of this report summarizes the CARFA legislation's history in the 108th and 109th Congresses and its provisions in the 109th Congress. The second section briefly discusses other review commission legislation in the 108th and 109th Congresses. The third section highlights perspectives that surfaced in the 108th Congress regarding some perceived advantages and disadvantages of the proposal. The report's fourth section then analyzes several issues that may be of interest in the 109th Congress in the event that the CARFA legislation or similar proposals to establish a review commission are further considered. In order of presentation, these issues include:

- the commission's membership;
- the scope of the commission's review and recommendations;
- definitions of key terms;
- standards and criteria for decision making;
- expedited congressional consideration; and
- transparency and participation.

Following that discussion, the report discusses potential success factors for commissions and, should Congress opt to consider them, potential alternatives or complements to a review commission. These alternatives or complements include pursuing or reauthorizing government reorganization, using the Government Performance and Results Act, and bolstering agency program evaluation capacity by establishing "chief program evaluation officers."

Proposed Legislation: The CARFA Act

Legislative History

Recent legislative history concerning the proposed CARFA legislation is discussed below, from both the 108th and 109th Congresses. The different types of measures within each Congress (stand-alone bills, budget process reform bills, budget resolutions, and the Bush Administration's results commissions proposal) are discussed in chronological order of introduction.

⁴ For analysis of the PART, see CRS Report RL32663, *The Bush Administration's Program Assessment Rating Tool (PART)*, by Clinton T. Brass.

⁵ For more in-depth analysis of issues regarding presidential reorganization authority, see CRS Report RL30876, *The President's Reorganization Authority: Review and Analysis*, by Ronald C. Moe.

108th Congress

Stand-Alone Bills

On September 26, 2003, Senator Sam Brownback introduced legislation (Commission on the Accountability and Review of Federal Agencies Act, S. 1668, 108th Congress) to establish a commission to “conduct a comprehensive review of Federal agencies and programs and to recommend the elimination or realignment of duplicative, wasteful, or outdated functions, and for other purposes” (bill title). The bill was referred to the Senate Committee on Governmental Affairs, and on September 29, 2003, was further referred to the committee’s Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia. The subcommittee held a hearing on S. 1668 on May 6, 2004.⁶ However, the bill did not receive further action.

A companion House bill, H.R. 3213, was introduced by Representative Todd Tiahrt on October 1, 2003, and was referred jointly to the House Committees on Government Reform and Rules, but did not receive further action.⁷ Under both the House and Senate bills, the proposed CARFA, made up of 12 members all appointed by the President, would have been required to review non-defense, non-entitlement federal agencies and programs—accounting for approximately one-fifth of the federal budget.⁸ Both bills would have required “funds saved” by the implementation of the commission’s plan and recommendations to be used to “support other domestic programs” or “pay down the national debt.”

Budget Process Reform Bills

Nearly identical provisions appeared in several budget process reform bills (108th Congress, H.R. 3800/S. 2752, H.R. 3925, and in floor amendments to H.R. 4663). These provisions, however, would have established a commission to review *all* federal executive agencies and programs (although H.R. 3925 did not provide for expedited congressional consideration) without requirements regarding the use of funds saved.⁹

⁶ U.S. Congress, Senate Committee on Governmental Affairs, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, *Trimming the Fat: Examining Duplicative and Outdated Federal Programs and Functions*, hearing, 108th Cong., 2nd sess., May 6, 2004, S.Hrg.108-672 (Washington: GPO, 2004). (Hereafter referred to as Senate Subcommittee Hearing on CARFA.)

⁷ Rep. Tiahrt subsequently spoke about H.R. 3213 on the House floor. See Rep. Todd Tiahrt, “Yes, We Are Better Off Now Than We Were Four Years Ago,” remarks in the House, *Congressional Record*, daily edition, vol. 150 (May 20, 2004), pp. H3531, H3533-3534.

⁸ A previous version of the Senate bill (S. 837, 108th Cong., introduced Apr. 9, 2003), also sponsored by Sen. Brownback, would have included entitlement programs within the commission’s scope. Legislation nearly identical to S. 1668/H.R. 3213 was introduced by the same Senate and House sponsors in the 107th Congress (S. 2488/H.R. 5090) in the summer of 2002, before issuance of the Bush Administration’s PART.

⁹ Debate on that legislation was mainly focused on statutory limits on discretionary spending and “pay-as-you-go” requirements for mandatory spending. H.R. 3800, the Family Budget Protection Act of 2004, was referred to committees on Feb. 11, 2004, but saw no further action. Secs. 321-327 of H.R. 3800 contained provisions that would have established a Commission to Eliminate Waste, Fraud, and Abuse and assigned the commission duties nearly identical to those in S. 1668/H.R. 3213, except that all agencies (as defined under 5 U.S.C. § 105) and programs within those agencies would have been within the commission’s scope (vice only non-defense discretionary programs being within scope under S. 1668/H.R. 3213). On June 24, 2004, provisions similar to H.R. 3800 were offered as an amendment in the nature of a substitute to H.R. 4663 (H.Amdt. 621) by Rep. Jeb Hensarling, but the amendment failed by a vote of 88-326. A companion Senate bill, S. 2752, was later introduced on July 22, 2004, and referred to committees, but saw no further action.

Budget Resolutions

In addition, the CARFA proposal was cited in the context of congressional budget resolutions in both the first and second sessions of the 108th Congress. In the FY2004 budget resolution (108th Congress, H.Con.Res. 95, Section 606), which was agreed to by the House and Senate, nonbinding sense of the Senate provisions called for the establishment of a commission

... to review Federal domestic agencies, and programs within such agencies, with the express purpose of providing Congress with recommendations, and legislation to implement those recommendations, to realign or eliminate government agencies and programs that are duplicative, wasteful, inefficient, outdated, or irrelevant, or have failed to accomplish their intended purpose.¹⁰

In remarks during Senate consideration of the resolution, Senator Brownback stated that this language referred to his CARFA proposal.¹¹

In the FY2005 budget resolution, nonbinding sense of the Senate provisions in the Senate-passed version (108th Congress, S.Con.Res. 95, Section 502) and in the House-passed conference report to the FY2005 budget resolution (H.Rept. 108-498, Section 602) called for enactment of the CARFA legislation.¹² The CARFA-related provisions stated, among other things,

... that legislation should be enacted that would create a bipartisan commission for the purpose of—(1) submitting recommendations on ways to eliminate waste, fraud, and abuse; and (2) ... provid[ing] recommendations on ways in which to achieve cost savings through enhancing program efficiencies in all [domestic] discretionary and entitlement programs.

These provisions further called for the commission to “realign or eliminate government agencies and programs that are duplicative, inefficient, outdated, irrelevant, or have failed to accomplish their intended purpose.”

H.R. 3925, the Deficit Control Act of 2004, was referred to committees on Mar. 10, 2004, but saw no further action. Secs. 311-316 of H.R. 3925 would have established a Commission to Eliminate Waste, Fraud, and Abuse and assigned the commission duties nearly identical to those in S. 1668/H.R. 3213, except that (a) all agencies (as defined under 5 U.S.C. § 105) and programs within those agencies would have been within the commission’s scope, and (b) the commission’s recommendations would *not* have received expedited congressional consideration. On June 24, 2004, provisions similar to H.R. 3925 were offered as an amendment in the nature of a substitute to H.R. 4663 (H.Amdt. 622) by Rep. Mark Steven Kirk, but the amendment failed by a vote of 120-296.

For general discussion of budget process reform proposals, see CRS Report RS21752, *Federal Budget Process Reform: A Brief Overview*, by Bill Heniff Jr. and Robert Keith.

¹⁰ The conference report to accompany the FY2004 budget resolution (H.Con.Res. 95, H.Rept. 108-71) was approved 216-211 in the House, in a largely party-line vote, on Apr. 11, 2003, and approved 51-50 in the Senate, in a largely party-line vote, on the same day. For more information, see CRS Report RL31754, *Congressional Budget Actions in 2003*, by Bill Heniff Jr.

¹¹ Sen. Sam Brownback, remarks in the Senate, *Congressional Record*, daily edition, vol. 149 (Mar. 20, 2003), pp. S4063-S4064.

¹² S.Con.Res. 95 was approved 51-45 in the Senate, in a largely party-line vote, on Mar. 12, 2004. H.Rept. 108-498 was approved 216-213 in the House, in a largely party-line vote, on May 19, 2004. For overall discussion of these measures, see CRS Report RL32246, *Congressional Budget Actions in 2004*, by Bill Heniff Jr.

109th Congress

Budget Resolution

For the third consecutive year, the CARFA proposal was cited in the context of congressional consideration of the budget resolution, in this case, for FY2006.¹³ The Senate-passed version of the budget resolution, S.Con.Res. 18, was agreed to on March 17, 2005, by a vote of 51-49. Section 502 of the measure contained a sense of the Senate provision very similar to the language that was included in the FY2004 budget resolution, albeit with changed word ordering and deletion of the word “domestic” when specifying the agencies that would be subject to such a review. At Senate passage, the section read as follows:

It is the sense of the Senate that a commission should be established to review Federal agencies, and programs within such agencies, with the express purpose of providing Congress with recommendations, and legislation to implement those recommendations, to realign or eliminate Government agencies and programs that are wasteful, duplicative, inefficient, outdated, irrelevant, or have failed to accomplish their intended purpose.

The section language was amended in the conference on the FY2006 budget resolution to include a clause that would also call for an “assessment of programs on an accrual basis” (H.Con.Res. 95, Section 502).¹⁴ On April 28, 2005, the conference report was agreed to in the House by a vote of 214-211 and in the Senate by a vote of 52-47. Subsequently, several bills were introduced proposing the establishment of CARFA or a CARFA-like commission.

Budget Process Reform Bill and Hurricane Cost Offset Bill

On May 11, 2005, Representative Jeb Hensarling introduced H.R. 2290 (Family Budget Protection Act of 2005), a budget process reform measure, with 58 original cosponsors. The bill was referred to House Committees on the Budget, Rules, Ways and Means, Appropriations, and Government Reform, but has not received further action. The measure was announced and endorsed by the Republican Study Committee.¹⁵ Subtitle III.C. of the bill (Sections 331-337) would provide for the establishment of a Commission to Eliminate Waste, Fraud, and Abuse. These provisions were identical to those from H.R. 3800, introduced in the 108th Congress, which, as discussed previously, would have established a commission to review *all* federal executive agencies and programs, though without requirements regarding the use of “funds saved” as a result of the commission’s plan and recommendations.

On October 27, 2005, Senator John Ensign introduced S. 1928 (Spending Money Accountably to Rebuild After Tragedy Act), with seven original cosponsors. The bill was referred to the Senate Committee on Homeland Security and Governmental Affairs, but has not received further action. Title III of the bill (Sections 301-308) would provide for the establishment of a CARFA. These provisions were nearly identical to those from S. 1155, Senator Brownback’s bill that would establish a CARFA.

¹³ For more this and the House version of the budget resolution, see CRS Report RL32791, *Congressional Budget Actions in 2005*, by Bill Heniff Jr.

¹⁴ U.S. Congress, Conference Committees, *Concurrent Resolution on the Budget for Fiscal Year 2006*, conference report to accompany H.Con.Res. 95, 109th Cong., 1st sess., H.Rept. 109-62 (Washington: GPO, 2005), p. 26.

¹⁵ Republican Study Committee, “House Conservatives Reintroduce Family Budget Protection Act,” press release, May 11, 2005, available in PDF in Congressional Quarterly’s *Budget Tracker* electronic newsletter, May 12, 2005, at <http://www.cq.com>.

Stand-Alone Bills

Representative Tiahrt introduced H.R. 2470 (Commission on the Accountability and Review of Federal Agencies Act) on May 18, 2005. The bill was referred to the House Committees on Rules and Government Reform, but has not received further action. The measure's provisions were identical to those of Representative Tiahrt's legislation from the 108th Congress, H.R. 3213, and Senator Brownback's legislation from the 108th Congress, S. 1668. Accordingly, the bill provided, among other things, that the commission's scope would not include the Department of Defense, entitlement programs, and agencies that solely administer entitlement programs. H.R. 2470 also, like the earlier bills, retained language providing for presidential appointment of all 12 commission members, and requiring that funds saved would be used to support other domestic programs or pay down the national debt.

Senator Brownback introduced S. 1155 (Commission on the Accountability and Review of Federal Agencies Act) on May 26, 2005, with 21 original cosponsors. The bill was referred to the Senate Committee on Homeland Security and Governmental Affairs, but has not received further action. While Representative Tiahrt's bill was identical to its predecessor from the 108th Congress, Senator Brownback's bill, in contrast, changed from the previous version in several respects. The major changes, which are described in more detail in this report's next section, included expanding the commission's scope to include DOD, agencies that solely administer entitlement programs, and the Executive Office of the President (EOP). In addition, S. 1155 provides for "hybrid" appointment of commission members by the President and Members of Congress, instead of only by the President. Finally, the bill deleted language that would have required "funds saved" to be used to support domestic programs or to pay down the national debt. When introducing the bill, Senator Brownback explained his reasoning for the changes and hopes for the proposal.

Last year, we had a bipartisan hearing on CARFA, at which all witnesses supported the CARFA concept. We have incorporated some of the suggestions made at the hearing, and I believe this year's version of CARFA is even better.

I am pleased that the Senate is already on record supporting the CARFA concept through Section 502 of this year's budget resolution, and it is my hope that we will be able to work with leadership to see CARFA become a reality this year.¹⁶

"Results Commissions" Proposal and Bills

Finally, a legislative proposal from the President for "results commissions" has been compared to the proposed CARFA Act. OMB issued a press release on January 26, 2005, mentioning the results commissions proposal,¹⁷ and OMB's Deputy Director for Management Clay Johnson III reportedly spoke with the media about the proposal at that time. Subsequently, a press report indicated that the proposed results commission "would function much like the military Base Realignment and Closure program."¹⁸ On February 7, 2005, President George W. Bush

¹⁶ Sen. Sam Brownback, remarks in the Senate, *Congressional Record*, daily edition, vol. 151 (May 26, 2005), p. S6053.

¹⁷ U.S. Office of Management and Budget, "Agencies Making Progress in Implementing President's Management Agenda; FY 2006 Budget Proposals to Build on Improved Federal Management," press release, 2005-03, Jan. 26, 2004 [sic; Jan. 26, 2005].

¹⁸ Allison Stevens and David Clarke, "Democrats May Have GOP Ally in Fight Over Bush's Proposed Personnel Changes," *CQ.com*, Jan. 28, 2005, available at <http://www.cq.com>.

transmitted his FY2006 budget proposal to Congress.¹⁹ As part of that proposal, the Bush Administration said it would propose, as a “next step” for the “budget and performance integration” initiative of the President’s Management Agenda (PMA), that Congress enact legislation to give the President authority to recommend the creation of results commissions.²⁰ The President also proposed establishment of a “sunset commission,” which is not analyzed in detail in this report.²¹

In justifying the proposal, the Administration asserted “[d]ysfunctional program overlap is why many of the 30 percent of programs [rated by the PART instrument] are rated either ineffective or unable to demonstrate results.”²² The Administration also claimed that “overlapping jurisdictions in Congress provide daunting hurdles to legislative remedies for the poor performance of duplicative programs.”²³ Another reference to the results commissions proposal, included in the Administration’s FY2006 budget, offered this justification:

The Federal government’s ability to serve the American people is often hampered by poorly designed programs or uncoordinated, overlapping programs trying to achieve the same objective. Overlapping jurisdictions in the Executive Branch and Congress provide daunting hurdles to legislative remedies to the poor performance of duplicative programs. Because the potential for savings and productivity are great, the Administration ... plans to propose legislation that gives the President the authority to propose Results Commissions. These commissions would consider and revise Administration proposals to improve the performance of programs or agencies by restructuring or consolidating them. Congress would approve individual Results Commissions to address single program or policy areas where duplication and the overlapping jurisdictions of Executive Branch agencies or Congressional committees hinder reform. Proposals approved by the commission would then be approved by the President and considered by Congress under expedited procedures.²⁴

On March 22, 2005, Deputy Director for Management Johnson said the Administration would submit the results and sunset commission draft legislation to Congress in the next few months.²⁵ With regard to the results commission proposal, he went further to say that Senator Brownback

¹⁹ For more information on the President’s proposal, see CRS Report RL32812, *The Budget for Fiscal Year 2006*, by Philip D. Winters; and CRS Report RS22062, *FY2006 Budget Documents: Internet Access and GPO Availability*, by Justin Murray.

²⁰ U.S. Office of Management and Budget, *Budget of the U.S. Government, Fiscal Year 2006, Analytical Perspectives*, pp. 15-16, 242. For an overview of the PMA, see CRS Report RS21416, *The President’s Management Agenda: A Brief Introduction*, by Virginia A. McMurtry.

²¹ For discussion of the proposed sunset legislation, see CRS Report RS22181, *A Sunset Commission for the Federal Government: Recent Developments*, by Virginia A. McMurtry.

²² U.S. Office of Management and Budget, *Budget of the U.S. Government, Fiscal Year 2006, Analytical Perspectives*, p. 15. The PART and its relationship to the proposed CARFA legislation are discussed in greater detail later in this report.

²³ *Ibid.*

²⁴ *Ibid.*, p. 242.

²⁵ CRS author’s notes. Deputy Director for Management Johnson spoke at a “perspectives on management” seminar, sponsored by the IBM Center for the Business of Government, Mar. 22, 2005, Washington, DC. For press coverage, see Jason Miller, “Administration Pushes Hill for Civil Service Reform,” *GCN.com*, Mar. 22, 2005, available at http://www.gcn.com/vol1_no1/daily-updates/35349-1.html; Kimberly Palmer, “Bush Administration Official Downplays Reorganization,” *GovExec.com*, Mar. 22, 2005, available at <http://www.govexec.com/dailyfed/0305/032205k1.htm>; and David Perera, “Johnson Pushes Bureaucratic Change,” *FCW.com*, Mar. 22, 2005, available at <http://www.fcw.com/article88377-03-22-05-Web>.

had sponsored similar legislation in the previous Congress, alluding to Senator Brownback's CARFA bill.

On June 30, 2005, OMB released the expected legislative proposal to establish results commissions and a sunset commission, entitled "The Government Reorganization and Program Performance Improvement Act of 2005," and said it had transmitted the proposal to Congress.²⁶ In a transmittal letter,²⁷ Joshua B. Bolten, Director of OMB, said OMB was submitting the draft legislation on behalf of the President. He asserted the "proposal would institutionalize for Congress and the Executive Branch procedures that would strengthen the focus on Government agencies and programs achieving results" and summarized the results commission proposal in language similar to what was included in the FY2006 budget proposal.

On July 14, 2005, bills were introduced in the Senate and House that substantially incorporated the draft results and sunset commission language, albeit with some changes.

- Representative Jon Porter introduced H.R. 3276 (Government Reorganization and Improvement of Performance Act), which would provide only for results commissions, with two original cosponsors. The bill was referred to the House Committees on Rules and Government Reform. On September 27, 2005, the bill was further referred to the House Committee on Government Reform's Subcommittee on the Federal Workforce and Agency Organization, which held a hearing on the bill (along with H.R. 3277, as described below) on the same day.²⁸ The bill has not received further action.
- Representative Kevin Brady introduced H.R. 3277 (Federal Agency Performance Review and Sunset Act), which would provide for a sunset commission, with two original cosponsors. The bill was referred to the House Committees on Rules and Government Reform. On September 27, 2005, the bill was further referred to the House Committee on Government Reform's Subcommittee on the Federal Workforce and Agency Organization (along with H.R. 3276, as described above), and was the subject of a hearing (along with H.R. 3276, as described above) on the same day. The bill has not received further action.
- Senator Craig Thomas introduced S. 1399 (The Government Reorganization and Program Performance Improvement Act of 2005), which would provide for both results commissions and a sunset commission. The bill was referred to the Senate Committee on Homeland Security and Governmental Affairs, but has not received further action.

More complete descriptions of these bills' provisions are available in the section of this report entitled "Other Review Commission Proposals."

The bills providing for results commissions (H.R. 3276/S. 1399) differ from the proposed CARFA legislation in many respects. These differences relate to:

²⁶ OMB's press release is available at <http://www.whitehouse.gov/omb/pubpress/2005/2005-16.pdf>. For the draft legislation, see http://www.whitehouse.gov/omb/legislative/grppi_act_2005.pdf. See http://www.whitehouse.gov/omb/legislative/grppi_act_2005-section.pdf for OMB's section-by-section description of the legislation.

²⁷ Available at http://www.whitehouse.gov/omb/legislative/grppi_act_trans_ltr.pdf.

²⁸ U.S. Congress, House Committee on Government Reform, Subcommittee on the Federal Workforce and Agency Organization, *It's Time to REACT—Reauthorizing Executive Authority to Consolidate Task: Establishing Results and Sunset Commissions*, hearing on H.R. 3276 and H.R. 3277, 109th Cong., 1st sess., Sept. 27, 2005, available at <http://reform.house.gov/FWAO/Hearings/EventSingle.aspx?EventID=34038>.

- establishment of commission(s) (e.g., under the results commission proposal, necessity for further congressional action, under expedited procedures, to establish unlimited number of President's proposed results commissions, while the proposed CARFA Act would, without using expedited procedures, establish one commission);
- appointment and size of membership (e.g., 7 members appointed by the President under the results commissions proposals, versus 12 members appointed by the President or the President and Members of Congress under the House and Senate versions, respectively, of the proposed CARFA Act);
- scope of commission review and recommendations (e.g., possibly narrower scope under a single results commission, albeit with unlimited ability of President to propose establishment, under expedited congressional procedures, of multiple results commissions in many policy areas, compared to wider scope under CARFA under a single commission); and
- standards and criteria for decision making (e.g., none specified for results commissions, in contrast with several criteria under CARFA).

Additional differences relate to issues of transparency, public participation, commission powers, and commission administrative provisions. Both the proposed results commissions and CARFA legislation would provide versions of expedited congressional consideration of commission recommendations.

Many aspects of the results commission proposals appear to resemble presidential reorganization authority under 5 U.S.C. §§ 901-912, which expired in 1984, but has been the subject of occasional congressional interest. In the subcommittee hearing on H.R. 3276, OMB Deputy Director for Management Clay Johnson III testified that the results commissions legislation was proposed, instead of reorganization authority, because the Administration judged "there was zero chance of [reorganization authority] ever being approved" by Congress.²⁹ Because of the major differences between the proposed CARFA Act and the results commission proposals, as described above, detailed discussion and analysis of the results commission proposals are not within the scope of this report. However, many issues concerning presidential reorganization authority are discussed and analyzed in detail elsewhere.³⁰

Overview of CARFA Legislation Provisions

The balance of this report analyzes the CARFA legislation as introduced in the bills sponsored by Representative Tiahrt and Senator Brownback in the 109th Congress (H.R. 2470/S. 1155). For topics where the two versions are the same, the discussion in the sections below does not differentiate between the bills. For topics where the two versions of the CARFA legislation substantively differ from one another, the sections describe the differences.

Duties of the Commission, President, and Joint Congressional Leadership

As drafted in H.R. 2470/S. 1155, the legislation would establish a 12-member CARFA and require the review commission's members to be appointed within 90 days of the legislation's enactment. The House version would require the President to appoint all 12 members of this

²⁹ Hearing transcript available at <http://www.cq.com>.

³⁰ See, in particular, CRS Report RL30876, *The President's Reorganization Authority: Review and Analysis*, by Ronald C. Moe; and CRS Report RL30795, *General Management Laws: A Compendium*, entry for "Reorganization Act of 1977, as Amended" in section IV.B. of the report, by Henry B. Hogue.

review commission. The Senate version, by contrast, would provide for a “hybrid” commission (i.e., appointment of members by both the President and certain Members of Congress) with four members appointed by the President, two appointed by the Senate majority leader, two appointed by the Senate minority leader, two appointed by the Speaker of the House, and two appointed by the House minority leader. Both versions would require the President to designate a chairperson and vice chairperson from among the commission members. It appears that officers and employees of the federal government and non-federal individuals could be appointed as members.

The proposed CARFA would be required to:

- under the House version, evaluate all executive branch agencies and programs, *excluding* agencies and programs within the Department of Defense (DOD), entitlement programs, “any agency that solely administers entitlement programs,” and perhaps the EOP;³¹ and, under the Senate version, evaluate all executive branch agencies and programs, including the EOP;³²
- determine, according to brief definitions in the legislation, if an agency or program is *duplicative, wasteful, inefficient, outdated, irrelevant, or failed*; and
- submit to the President and Congress, not later than two years after the date of enactment, a plan with recommendations of how any such agencies and programs should be realigned or eliminated, along with supporting documentation and proposed legislation to implement the recommendations.

Under the House version of the CARFA legislation, a determination that certain agencies or programs fit one or more definitions of *duplicative, wasteful, inefficient, outdated, irrelevant, or failed* would require the commission to make recommendations, as outlined in the bill, to realign or eliminate the agencies or programs. In the Senate version, by contrast, if an agency or program were determined only to be *wasteful* or *inefficient*, the commission would be allowed, but not required, to recommend realignment or elimination. In addition, under the House version, the legislation proposed by the commission would be required to provide that all funds saved by implementation of the commission’s plan be used to “support other domestic programs” or “pay down the national debt.” Under the Senate version, there would be no requirement regarding uses of saved funds.

The legislation would also require the President, not later than one year after the date of enactment, to:

- establish a systematic method, according to certain requirements, for assessing the effectiveness and accountability of these agencies and programs;

³¹ The EOP would probably not be considered an “agency” under the CARFA legislation’s definition of agency (which points to 5 U.S.C. § 105), because the EOP was not explicitly established as an executive department, government corporation, or independent establishment. For background on the EOP, see CRS Report 98-606, *The Executive Office of the President: An Historical Overview*, by Harold C. Relyea. For analysis of circumstances in which the EOP or entities within the EOP are considered agencies under various laws, see CRS Report RL32592, *General Management Laws and the 9/11 Commission’s Proposed Office of National Intelligence Director (NID) and National Counterterrorism Center (NCTC)*, coordinated by Clinton T. Brass and Curtis W. Copeland.

³² As described later in this report, in the 108th Cong., proponents described the scope contained in the House version (which in the 108th Cong. was the scope provided by both the House and Senate versions) as a “reasonable first step,” while critics have viewed this sort of scope as overly narrow or reflecting an implicitly partisan outlook. As described above, in the 109th Cong., the scope of the Senate version of the CARFA legislation was expanded by eliminating the prior exclusions (which remain in the House version) and including the EOP under the bill’s definition of “agency.”

- submit to the commission assessments of not less than one-half of all the legislation's covered programs; and
- identify "common performance measures" for covered programs that have "similar functions."³³

The commission would be required to "consider" the assessments submitted by the President, but only after the commission reviewed and accepted the President's method for assessing agencies and programs.

Powers of the Commission

CARFA would be empowered to hold hearings; issue subpoenas for testimony and evidentiary materials; secure information from federal agencies; use the U.S. mail as do other federal agencies; and accept, use, and dispose of gifts or donations of services or property.

Commission Personnel Matters³⁴

Non-federal CARFA members would not receive compensation except for travel expenses. Federal officers or employees would continue to receive their normal compensation. The CARFA chairperson would be authorized to appoint and terminate an executive director (subject to confirmation by the commission) and other commission staff without regard to civil service laws and regulations. The rate of pay for the commission's executive director and other personnel would not be allowed to exceed the maximum rate payable for a GS-15 position under Section 5332 of Title 5, *United States Code*, which establishes the General Schedule of civil service pay rates. The executive director and personnel of the commission would be considered federal employees under several chapters of Title 5, *United States Code*, for the purposes of leave (Chapter 63); compensation for work injuries (Chapter 81); retirement (Chapters 83 and 84); unemployment compensation (Chapter 85); life insurance (Chapter 87); health insurance (Chapter 89); and long-term care insurance (Chapter 90). Under the Senate version, the executive director and commission personnel would also be considered federal employees for the purposes of "enhanced dental benefits" (Chapter 89A) and "enhanced vision benefits" (Chapter 89B). Federal government employees could be detailed to the commission without reimbursement to the lending agency.

Expedited Congressional Consideration

The legislation would establish an expedited procedure for each house to consider the commission's proposed legislation ("implementation bill").³⁵ These provisions (like other expedited procedures) would operate as procedural rules of each chamber for consideration of the

³³ The CARFA legislation from the 107th Cong. (S. 2488/H.R. 5090), which was introduced before issuance of the Bush Administration's PART, did not include the language included in S. 1668/H.R. 3213 providing for "systematic assessment of programs" (Sec. 3(d)), which is arguably similar to the Administration's PART. The PART and "common performance measures" have been components of the "budget and performance integration" initiative of the Bush Administration's President's Management Agenda. For more on the Administration's efforts concerning common performance measures, see <http://www.whitehouse.gov/omb/budintegration/common.html>. For more on the PMA, see CRS Report RS21416, *The President's Management Agenda: A Brief Introduction*.

³⁴ For more information about cited chapters of Title 5, *United States Code*, see CRS Report RL30795, *General Management Laws: A Compendium*, coordinated by Clinton T. Brass.

³⁵ For a brief overview of expedited legislative procedures, see CRS Report RS20234, *Expedited or "Fast Track" Legislative Procedures*, by Christopher M. Davis. For a more detailed discussion, see CRS Report 98-888, *"Fast Track" or Expedited Procedures: Their Purposes, Elements, and Implications*, by Christopher M. Davis.

implementation bill. Therefore, each house would be able to alter the procedural rules at any time, pursuant to its constitutional power to change its own rules. The measure would provide for automatic introduction of the implementation bill in each chamber and referral to any appropriate committees of jurisdiction. Under the House version of the CARFA legislation, a committee would be allowed to report the implementation bill “without amendment.” Under the Senate version, a committee would be allowed to “review and comment” on the implementation bill and report it to the Senate, but “may not amend” the implementation bill. If a committee did not report the implementation bill within 15 calendar days after the bill’s introduction, the committee would be automatically discharged of further consideration, and the measure would be placed on the chamber’s appropriate calendar. It would then be in order for any Member to move that the respective house proceed to consider the bill. All points of order against this motion to proceed would be waived. If the motion were defeated, it could be repeated. Various potential dilatory motions against this motion to proceed would also be prohibited. If the chamber chose to consider the implementation bill by adopting the motion to proceed, consideration of the measure would be “locked in.” Debate would be limited to 10 hours, and no amendment to the implementation bill would be in order. At the conclusion of debate, a vote on final passage would occur automatically. (This vote could be preceded by a single quorum call, if requested.) If either house had already received the implementation bill passed by the other house, the vote on final passage would occur on the received companion bill.

Authorization of Appropriations

The House version would provide authorization for appropriations for the fiscal years FY2004 through FY2006,³⁶ and the Senate version would provide authorization for appropriations for FY2006 through FY2008.

Other Review Commission Proposals

Other review commission bills were introduced in the 108th and 109th Congresses, in addition to the CARFA legislation. Detailed analysis of each of these measures is outside the scope of this report, but provisions of the bills raise many of the same issues as the CARFA legislation. These issues may be of interest should Congress opt to consider review commission legislation in the 109th Congress. None of these bills was the subject of hearings or reported from committee.

108th Congress

H.R. 1227 (Representative Kevin Brady), the Abolishment of Obsolete Agencies and Federal Sunset Act of 2003, would have established a Federal Agency Sunset Commission to review agencies and make recommendations for administrative and legislative action, and provided that agencies be abolished if not reauthorized by Congress.³⁷ Among other things, the legislation would have provided for appointment of commission members by the Speaker of the House and Senate majority leader, public hearings, and opportunities for public comment. These general topics, regarding a review commission’s membership and opportunities for participation in the commission’s work, are discussed later in this report with regard to the CARFA legislation.

H.R. 1632 (Representative Edward R. Royce), the Government Reform Act of 2003, would have established a Government Reform Commission to review federal agencies and programs and

³⁶ Fiscal years per the language in the bill.

³⁷ For a discussion of “sunset” commission proposals, see CRS Report RL31455, *Federal Sunset Proposals: Developments in the 94th to 107th Congresses*, by Virginia A. McMurtry.

propose a reorganization plan for federal agencies, which would have received expedited consideration from the President and Congress in a process that, according to the bill, was modeled on the BRAC commission statute. The legislation would have provided for appointment of commission members by the President. The President would have been required to consult with both majority and minority leaders in the House and Senate regarding four commission members, and the President would have been prohibited from appointing more than a certain number of members from the same political party. The topics of expedited congressional consideration and commission membership are, as stated above, discussed in this report with regard to the CARFA legislation.

H.R. 2153 (Representative Richard Gephardt), the Corporate Subsidy Reform Commission Act of 2003, would have required federal agencies to identify programs and laws that the agency head determined were “inequitable federal subsidies,” established a commission to review the agency head determinations, and required the commission to submit to the President a report with its findings and recommendations. The President would have been required to review this report and submit to the commission a report indicating whether the President approved or disapproved the “entire package” of the commission’s recommendations, including, in the case of disapproval, his reasons. In the case of disapproval, the commission would have been required to submit to the President a revised list of recommendations. If the President approved the package, the President would have been required to submit the recommendations to Congress, along with supporting information, for expedited consideration. If the President disapproved a revised package or did not submit to Congress an approval, the act’s provisions would have been terminated. The commission’s scope under this legislation would have been *narrower* than the CARFA proposal in some respects (e.g., H.R. 2153 included only some kinds of funding in its scope) but wider in others (e.g., including tax laws, not just programs and agencies). Appointments to the commission would have been made by both the President and leadership of Congress, majority and minority. This legislation was in several respects similar to H.R. 2902 and H.R. 3762, described below.

H.R. 2902 (Representative Adam Smith), the Corporate Subsidy Reform Commission Act of 2003, would have required federal agencies to identify programs and laws that the agency head determined were “inequitable federal subsidies”; established a commission to review the agency head’s determinations; and required the commission to submit to Congress its findings and recommendations. The commission’s scope under this legislation would have been *narrower* than the CARFA proposal in some respects (e.g., H.R. 2902 included only funds that are provided by the federal government to corporations and other entities, and excluded funds that “primarily benefit” public health, safety, homeland security, the environment, or education) but *wider* in others (e.g., would have included tax advantages and potentially other non-appropriated benefits for corporations and other entities). The legislation also would have provided for appointment of commission members by congressional leaders and commission meetings open to the public. Another bill, H.R. 3762 (Representative Adam Smith), the Corporate Subsidy Reform Commission Act of 2004, was nearly identical to H.R. 2902, but with an expanded scope of “inequitable federal subsidies” to be reviewed.

H.R. 2903 (Representative Adam Smith), the Program Reform Commission Act of 2003, would have required federal agencies to identify programs that the agency head determined were “no longer necessary,” established a commission to review the agency head determinations, and required the commission to submit to Congress its findings and recommendations. Under the legislation, the commission’s scope would have been extended to “programs” in all agencies of the federal government, arguably including all three branches and other entities, but would have narrowed the scope to exclude programs that “primarily benefit” public health, safety, homeland security, the environment, or education. The measure would have also provided for commission member appointment and open meetings similar to those in H.R. 2902. Another bill, H.R. 3761

(Representative Adam Smith), the Program Reform Commission Act of 2004, was nearly identical to H.R. 2903, but with an expanded scope of “programs” to be reviewed.

109th Congress

H.R. 973 (Representative Adam Smith), the Program Reform Commission Act, is nearly identical to H.R. 3761 (108th Congress), described above. Changes to the bill, compared to the prior version from the 108th Congress, include explicitly establishing the commission in the legislative branch and prohibiting an officer or employee of a federal agency from serving as a member, among others.

H.R. 974 (Representative Adam Smith), the Corporate Subsidy Reform Commission Act, is nearly identical to H.R. 3762 (108th Congress), described above. Changes to the bill, compared to the prior version, include establishing the commission in the legislative branch and prohibiting an officer or employee of a federal agency from serving as a member, among others.

H.R. 3276 (Representative Jon Porter), the Government Reorganization and Improvement of Performance Act, incorporated language from the Bush Administration legislative proposal described previously in this report, regarding “results commissions,” with changes. (H.R. 3277, described below, incorporated language from the same Bush Administration proposal, but instead regarding a “sunset commission.”) The bill would allow the President to propose the establishment of results commissions to Congress and to specify the agencies or programs the proposed commission would study. Congress would consider the establishment of a results commission under expedited procedures. If Congress established a results commission, the President would be required to appoint seven commission members, “who shall serve at the pleasure of the President,” of whom four would be required to be appointed “in consultation” with certain congressional leaders. The President would be allowed to submit proposals to the commission to reorganize agencies or programs in certain “areas where multiple Federal programs have similar, related, or overlapping responsibilities... .” The commission would evaluate the proposal, hold public hearings “to the extent appropriate,” and respond to the President with recommended changes. If the President disapproved the commission recommendations in whole or in part, the commission would be required to respond to the President’s “concerns” with any changes in recommendations. The President would then be allowed to transmit to Congress for expedited consideration the commission’s final recommendations together with draft legislation to implement the recommendations.³⁸ The commission would cease to exist within nine months after it commenced operations. The topics of expedited congressional consideration and commission membership, among others, are discussed in the present report with regard to the CARFA legislation.

H.R. 3277 (Representative Kevin Brady), the Federal Agency Performance Review and Sunset Act, substantially incorporates language from the Bush Administration legislative proposal described previously in this report, regarding a sunset commission, albeit with changes. The bill would establish a sunset commission that, according to a schedule prepared by the President and considered by Congress under expedited procedures, would review executive branch programs and agencies according to certain criteria. Apparently to provide assistance in crafting the President’s schedule, the Director of the Congressional Research Service, with the assistance of the Comptroller General, would be required to prepare and update an inventory of all executive branch agencies and programs. The President would be required to appoint seven commission members, “who shall serve at the pleasure of the President,” of whom four would be required to

³⁸ Some of these provisions appear similar to the multi-stage process for reviewing recommendations under the BRAC legislation.

be appointed “in consultation” with certain congressional leaders. The commission would be required to consider recommendations made by the President and would be allowed to consider “agency or program evaluations and assessments,” including those undertaken by OMB. The OMB “assessments” would be required to evaluate several aspects of programs. These aspects are identical to those enumerated in H.R. 185 (Program Assessment and Results Act), which would require OMB program assessments modeled on the Bush Administration’s PART.³⁹ The commission would be required to hold public hearings “to the extent appropriate,” and report annually to the President with recommendations and legislation needed to carry out its recommendations. Agencies and programs would be abolished two years after the date that the President submitted the report to Congress, unless the agency or program were reauthorized by law after the President’s submission, or unless the two-year period were extended by an additional two years, by law. The commission would terminate on December 31, 2026.

H.R. 3282 (Representative Kevin Brady), the Abolishment of Obsolete Agencies and Federal Sunset Act of 2005, is nearly identical to H.R. 1227 (108th Congress), described previously. However, among other differences from the prior version, the current bill would not authorize the commission to make recommendations for appropriation levels.

S. 1399 (Senator Craig Thomas), “The Government Reorganization and Program Performance Improvement Act of 2005,” substantially incorporates language from the Bush Administration legislative proposal described previously, regarding both results commissions and a sunset commission, albeit with changes. The bill’s provisions relating to results commissions are very similar, but not identical, to those in H.R. 3276 (e.g., there are several structural and technical differences in the language). The bill’s provisions relating to a sunset commission are very similar, but not identical, to those in H.R. 3277 (e.g., certain regulations would be exempt from potential abolishment under the act).

Perspectives on CARFA from the 108th Congress: Senate Hearing on Proposed CARFA Act

A number of potential issues, advantages, and disadvantages regarding the proposed CARFA legislation were highlighted during the hearing for S. 1668, 108th Congress, before the Senate Committee on Governmental Affairs, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia. No hearings on the companion House bill, H.R. 3213, were held. In the 109th Congress, the House version of the CARFA legislation, H.R. 2470, is identical to the Senate version from the 108th Congress, S. 1668.

Opening Statement

On May 6, 2004, the subcommittee convened a hearing on S. 1668. In his opening statement, Chairman George Voinovich said:

[The CARFA Act] focuses our attention on an important question facing Congress as we attempt to allocate scarce Federal resources. How do we identify and reform or eliminate wasteful, ineffective, and outdated government programs?...

The biggest problem we must overcome in this effort is that almost every program in the Federal Government, no matter how ineffective or spendthrift, has its own core of

³⁹ For discussion of the PART, see CRS Report RL32663, *The Bush Administration’s Program Assessment Rating Tool (PART)*. For discussion of H.R. 185, see CRS Report RL32164, *Performance Management and Budgeting in the Federal Government: Brief History and Recent Developments*, by Virginia A. McMurtry.

supporters.... It would be wishful thinking, at best, to believe we can restructure or shut down large numbers of programs across multiple Federal agencies without provoking a firestorm of opposition. Nevertheless, that task must be undertaken if we are to have any hope of providing taxpayers the most effective and efficient government possible. That is the goal of the legislation before us today.⁴⁰

Senator Voinovich also cited work done by the General Accounting Office (GAO), which identified “areas of overlap and fragmentation” among federal agencies and programs.⁴¹

Sponsor Testimony

In a prepared statement, Senator Brownback outlined the CARFA proposal, saying that “once a program comes into existence, experience tells us that the program is here to stay—whether it is successful, unsuccessful, or outdated.” Senator Brownback also displayed FY2004 and FY2005 scores from the Bush Administration’s PART in a “report card” for federal agencies,⁴² and said that “examples of government programs that have failed to address effectively the problem they targeted abound.” Furthermore, Senator Brownback’s prepared statement argued that to

address the problem of eliminating well-intended, though ineffective or outdated government programs ... we must learn from both our past failures and successes. ... I believe we have had one process that has been successful in the realm of program-elimination and prioritization of spending—the Base Realignment and Closure Commission (BRAC) ... with the BRAC commission submitting its recommendations to Congress for the realignment and closure of military bases, [and] the Congress taking an up-or-down vote to accept or reject the plan as a whole.... [W]ith this in mind, I specifically modeled the [CARFA Act] after BRAC....

Whereas the BRAC Commission examined military bases and the Department of Defense (DOD), CARFA would review federal agencies, and programs within agencies. The scope of this commission would be directed toward non-DOD discretionary agencies and programs ... roughly, a modest quarter of federal spending. I see this as a reasonable first step. If CARFA is successful, future Congresses may choose to authorize new rounds, as there have been multiple rounds of BRAC.⁴³

⁴⁰ Opening Statement of Sen. George Voinovich, Senate Subcommittee Hearing on CARFA, pp. 1-2.

⁴¹ The cited GAO analysis can be found in U.S. General Accounting Office, *Major Management Challenges and Program Risks: A Governmentwide Perspective*, GAO/OCG-99-1, Jan. 1999, pp. 13-14. A subsequent listing of GAO’s overall analysis is available in U.S. General Accounting Office, *Managing for Results: Barriers to Interagency Coordination*, GAO/GGD-00-106, Mar. 2000, p. 5. In the later analysis, GAO labeled the areas only as *potential* areas of fragmentation and overlap. The General Accounting Office was renamed the Government Accountability Office with enactment of the GAO Human Capital Reform Act of 2004, P.L. 108-271, on July 7, 2004. This report will use the previous name when citing sources published under that name.

⁴² For the report card, see <http://brownback.senate.gov/OriginalDocs/fedgovtreportcard.pdf>. For more on the PART, see CRS Report RL32663, *The Bush Administration’s Program Assessment Rating Tool (PART)*.

⁴³ Prepared statement of Sen. Brownback, Senate Subcommittee Hearing on CARFA, pp. 27-30. In a lecture published earlier by the Heritage Foundation, Sen. Brownback stated that

... [t]he types of program to be reviewed would include (among many others) the National Endowment for the Arts (NEA), and the National Endowment for the Humanities (NEH), and the Occupational Safety and Health Administration (OSHA). Programs excluded from the commission’s review include the DOD and entitlement (or mandatory spending) programs such as Social Security, the Federal Deposit Insurance Corporation (FDIC), the Federal Direct Student Loan Program, and Medicaid Grants to States.

Sen. Brownback also indicated that “the Senate Leadership has indicated support of the CARFA Act.” (Sen. Sam Brownback, “A Strategy to Eliminate Wasteful Federal Spending,” *Heritage Lectures*, no. 806 (Washington: Heritage

Senator Brownback's prepared statement also addressed what he said were two potential concerns.

Some have raised concerns that CARFA would amount to the Congress delegating its authority. I answer this concern by noting that CARFA is an appropriate exercise of Congressional oversight and authority. Nothing substantive happens unless the Congress passes the Commission's proposed legislation.

Others have concerns over the expedited process for CARFA, because amendments at either the committee level or on the Floor are not in order. I answer this concern by noting that the only chance we have for successfully eliminating government waste through CARFA is a straight up-or-down vote. BRAC was successful because members had to vote on the whole package.... In the case of CARFA, if members could offer amendments to exempt specific programs or agencies, CARFA will not be successful.⁴⁴

Echoing some of the same themes earlier in the year, the CARFA legislation's House sponsor, Representative Tiahrt, had offered the following observations in a "U.S. Capitol Update" dated March 12, 2004, on his website:

Many members of Congress have recognized the need for an independent body with the appropriate resources to review the federal bureaucracy and identify programs that are duplicative, ineffective or inefficient. By giving Congress an up-or-down vote on a single package, it will eliminate a great deal of the political wrangling that usually accompanies cutting a government program. Frankly, it also recognizes the fact that members of Congress simply do not have the time or resources to delve into the details of the federal government and provide the type of accountability we would prefer.⁴⁵

OMB Testimony

OMB's deputy director for management, Clay Johnson III, expressed support at the hearing for both Congress and the executive branch systematically to assess "program performance and cost" as well as to "[work] with [Congress] to craft a sensible approach to ensure that a focus on results becomes a habit ... and irreversible."⁴⁶ Deputy Director Johnson also stated that "[r]equiring by statute that program performance and cost be systematically assessed would help accomplish this."⁴⁷ However, in representing the Administration, he did not explicitly endorse the bill or the idea of a commission. During the Senate hearing, Deputy Director Johnson said the Bush

Foundation, Oct. 28, 2003), pp. 2-3, available at <http://www.heritage.org/Research/Budget/HL806.cfm>.)

⁴⁴ Prepared statement of Sen. Brownback, Senate Subcommittee Hearing on CARFA, p. 31.

⁴⁵ See http://www.house.gov/tiahrt/communications/capitol_update/2004/03-12-2004.htm.

⁴⁶ Prepared statement of OMB Deputy Director for Management Clay Johnson III, Senate Subcommittee Hearing on CARFA, p. 35.

⁴⁷ Ibid. In a previous House hearing, OMB Deputy Director for Management Johnson expressed support for legislative efforts that would require performance reviews of federal programs. For media coverage of the hearing, see Amelia Gruber, "OMB Deputy Supports Performance Reviews for Federal Programs," *GovExec.com*, Feb. 11, 2004, available at <http://www.govexec.com/dailyfed/0204/021104a1.htm>. See also U.S. Congress, House Committee on Government Reform, Subcommittee on Government Efficiency and Financial Management, *The President's Management Agenda—Are Agencies Getting to Green?*, hearing, 108th Cong., 2nd sess., Feb. 11, 2004, H.Hrg. 108-155 (Washington: GPO, 2004), p. 12. Later in the 108th Congress, Reps. Todd Platts and Tom Davis introduced H.R. 3826, the Program Assessment and Results (PAR) Act, which was reported favorably, as amended, with a report and minority views, by the House Committee on Government Reform on Oct. 8, 2004. The measure would have created a statutory process resembling the PART. A companion Senate bill (S. 2898) was introduced on Oct. 5, 2004, by Sen. Peter Fitzgerald. Similar legislation was introduced in the 109th Congress. For discussion of the history behind this proposal and current developments, see CRS Report RL32671, *Federal Program Performance Review: Some Recent Developments*, by Virginia A. McMurtry.

Administration was willing to establish a “formal partnership” with Members of Congress who are interested in evaluating and streamlining programs.⁴⁸ He also testified that the Bush Administration supported expedited congressional consideration of proposals to realign or eliminate certain programs, and that the proposed CARFA should “rely on PART information [and] rely on evaluations from the Executive Branch, from OMB or the agencies” when recommending programs for realignment or elimination. In addition, if the commission wished, it could “challenge some of [the PART] assessments ... and add fresh perspective to it.”⁴⁹ In that context, Senator Voinovich spoke about a need to use nonbiased criteria in formulating the commission recommendations. Deputy Director Johnson added that OMB has made PART scores and analysis publicly available, because “[t]hese evaluations have to be able to stand the test of public scrutiny.”⁵⁰

Citizens for a Sound Economy Testimony

Former House Majority Leader Richard K. Arney, co-chairman of Citizens for a Sound Economy (which subsequently merged with Empower America to form FreedomWorks), testified in favor of the proposed CARFA Act at the Senate hearing.⁵¹ Mr. Arney stated, “Washington has a spending problem,” and “[the CARFA Act] aims to find federal waste in a systematic fashion, guided by a clear and uncontroversial set of principles, and eliminate it.” He also suggested that the CARFA proposal could be broadened to include all discretionary spending.⁵² Mr. Arney cited a GAO report that, in view of several trends, concluded, “a fundamental review is needed to ensure relevant and sustainable government programs.”⁵³ In addition, Mr. Arney compared the proposed CARFA Act favorably with BRAC.

CARFA, like BRAC, would take parochial politics out of the budget process and make members decide in an up or down vote whether they wanted to realign and streamline the use of taxpayer’s dollars going to duplicative, wasteful or irrelevant agencies. In effect,

⁴⁸ Testimony of OMB Deputy Director for Management Clay Johnson III, in Senate Subcommittee Hearing on CARFA, p. 9.

⁴⁹ Ibid., pp. 9, 13. See also Amelia Gruber, “OMB Backs Congressional Effort to Review Programs,” *GovExec.com*, May 7, 2004, available at <http://www.govexec.com/dailyfed/0504/050704a1.htm>.

⁵⁰ Testimony of OMB Deputy Director for Management Clay Johnson III, in Senate Subcommittee Hearing on CARFA, p. 13. As noted in CRS Report RL32663, *The Bush Administration’s Program Assessment Rating Tool (PART)*, some stakeholders and observers have disagreed about whether or not the PART stands the test of scrutiny. The Administration has said the PART is objective and non-ideological in evaluating programs, but other observers have said the PART is subjective, invalid, or may have been used for political purposes. OMB published PART scores and analysis in the President’s proposed budgets for FY2004, FY2005, and FY2006.

⁵¹ According to FreedomWorks’ website at <http://www.freedomworks.org>, the organization has “a legal structure that includes a 501(c)(3) [organization, under the Internal Revenue Code], a 501(c)(4), a 527, a federal [political action committee (PAC)], and various state PACs,” and works for “lower taxes, less government, and more economic freedom.” For more on 501(c)(3) organizations, see CRS Report RS21892, *Application Process for Seeking 501(c)(3) Tax-Exempt Status*, by Erika Lunder.

⁵² Prepared statement of Richard K. Arney, Senate Subcommittee Hearing on CARFA, p. 52.

⁵³ The cited report is U.S. General Accounting Office, *Major Management Challenges and Program Risks: A Governmentwide Perspective*, GAO-03-95, Jan. 2003, p. 8. GAO’s report went on to state that “[s]uch a reassessment must include both mandatory and discretionary spending and tax preferences, ... [and that] ... any reassessment of federal missions and strategies should include an examination of the entire set of tools that the federal government can use to address national objectives [including] direct spending, loans and loan guarantees, tax expenditures, and regulations” (pp. 8-9).

you would ask members of Congress to take a clear up or down vote on waste primarily benefitting other districts, effectively turning the politics of pork upside down.⁵⁴

Mr. Arney also testified about insulating the commission's work from politics.

For the [BRAC-like] process to work, then, you must have professional information, professional data, and serious hard-working members of the commission that will not allow politics to impinge on their thinking. And Congress needs the assurance that it will not be political.... [T]he most important thing you must have [in this legislation] is insulation from politics so that the members will not be concerned about having political reprisals taken against them, the need of a professional criteria and professional judgment by a serious hard-working commission that commands the respect of the members.⁵⁵

Progressive Policy Institute Testimony

The hearing's final witness, Paul Weinstein Jr. of the Progressive Policy Institute (PPI), testified that "[t]he executive branch needs a top-to-bottom overhaul" and that "[PPI] has long advocated creating a commission to reinvent government and eliminate corporate welfare."⁵⁶ Furthermore, Mr. Weinstein stated:

Our organization has long believed that the best way to achieve comprehensive reform of the executive branch is to combine the commission function with a mechanism to require Congress to vote on its recommendations. Senator Brownback's CARFA legislation would provide for this type of commission.... However, I believe ... S. 1668 needs to be modified in several key aspects.

Mr. Weinstein outlined four themes for modifying the legislation. First, under the heading "Bipartisanship," he argued that the CARFA Act should follow the BRAC model more closely by requiring the members to be appointed by the President by and with the advice and consent of the Senate and composed of equal numbers of Republicans and Democrats.⁵⁷ Second, under the heading "Expanded Scope," Mr. Weinstein recommended including all executive branch agencies, programs, and "targeted tax incentives" in the commission's scope of review. Third, under the heading "Multiple Rounds," he recommended that the commission be allowed to submit more than one round of recommendations, in order to provide the proposed CARFA with "needed flexibility" in the face of complicated work, and to build public support and increase the likelihood of success. Fourth and finally, under the headline "Additional Criteria," Mr. Weinstein recommended including additional criteria for the commission to consider (in addition to the bill's "duplicative," "wasteful or inefficient," and "outdated, irrelevant, or failed" standards). These criteria would include restructuring agencies into mission-focused departments, simplifying programmatic regulations, eliminating corporate subsidies "that do not serve the

⁵⁴ Prepared statement of Richard K. Arney, Senate Subcommittee Hearing on CARFA, p. 52. Mr. Arney has sometimes been referred to as "father" of BRAC in acknowledgment of his principal authorship of the base closure statute.

⁵⁵ Testimony of Richard K. Arney, in Senate Subcommittee Hearing on CARFA, pp. 17-18.

⁵⁶ Prepared statement of Paul Weinstein Jr., *ibid.*, p. 54. According to PPI's website at <http://www.ppionline.org>, PPI "is a research and education institute that is a project of the Third Way Foundation Inc., a nonprofit corporation organized under section 501(c)(3) of the Internal Revenue Code," whose "mission is to define and promote a new progressive politics for America in the 21st century."

⁵⁷ Mr. Weinstein cited the Defense Base Closure and Realignment Act of 1990 (P.L. 101-510; 104 Stat. 1808) as his model. That legislation stated that the President "should consult" with the Speaker of the House of Representatives concerning the appointment of two members, the majority leader of the Senate concerning two members, and each of the minority leaders of the House of Representatives and the Senate, respectively, regarding one member (for a total of six consultations). The BRAC framework did not explicitly require that the commission be composed of equal numbers of Democrats and Republicans, but did require Senate confirmation of all members.

public interest,” and directing the commission to make no recommendations that “it believes might negatively impact the health, safety, and security of the American people.”

Potential Issues for Congress

Several issues and options may be of interest to Congress if the CARFA legislation receives further consideration during the 109th Congress, or if Congress opts to consider alternative approaches to reviewing executive branch operations and making improvements. For ease of presentation, these items are grouped into three sections:

- potential issues regarding a review commission;
- potential success factors for a commission; and
- potential alternatives or complements to a review commission.

Potential Issues Regarding a Review Commission

Congress and the President have a variety of policy and procedural tools that can help them assess government operations, organization, and performance. One such tool that has been used occasionally by Congress has been the statutorily created review commission. During the 20th century, Congress and the President established a number of review commissions that were intended to promote improved efficiency, effectiveness, accountability, and transparency in the executive branch. With varying emphases, these commissions typically reviewed executive branch organization, operations, and management, as well as associated public policies. A detailed assessment of each of these efforts is beyond the scope of this report.⁵⁸ However, characteristics of past review commissions can highlight potential points of contrast with the CARFA legislation or other review commission proposals. In particular, the present report frequently highlights some of the characteristics of two commissions—the Hoover Commission (which operated from 1947 to 1949)⁵⁹ and the BRAC commission established under P.L. 101-510 (three of which operated from 1991 to 1995 during time periods that did not overlap).⁶⁰

⁵⁸ In general, assessments of the results of these commissions have been mixed. For detailed background and discussion, see CRS Report RL31446, *Reorganizing the Executive Branch in the 20th Century: Landmark Commissions*, by Ronald C. Moe; Peri E. Arnold, *Making the Managerial Presidency: Comprehensive Reorganization Planning 1905-1996*, 2nd ed. (Lawrence, KS: University Press of Kansas, 1998); and Paul C. Light, *The Tides of Reform: Making Government Work, 1945-1995* (New Haven, CT: Yale University Press, 1997). For discussion of management reform from a legislative perspective, see CRS Report RL32388, *General Management Laws: Major Themes and Management Policy Options*, by Clinton T. Brass; and David H. Rosenbloom, *Building a Legislative-Centered Public Administration: Congress and the Administrative State, 1946-1999* (Tuscaloosa, AL: University of Alabama Press, 2000). For a discussion of partly related “sunset” commission proposals, which typically call for systematic evaluation and, in addition, an action-forcing mechanism that carries the ultimate threat of program termination, see CRS Report RL31455, *Federal Sunset Proposals: Developments in the 94th to 107th Congresses*, by Virginia A. McMurtry.

⁵⁹ P.L. 80-162, 61 Stat. 246. This was the first of two Hoover Commissions. All references in this report are to the first Hoover Commission. The second Hoover Commission operated from 1953 to 1955. For more information, see CRS Report RL31446, *Reorganizing the Executive Branch in the 20th Century: Landmark Commissions*.

⁶⁰ P.L. 101-510, 104 Stat. 1808. For more about the BRAC commissions, see CRS Report 97-305, *Military Base Closures: A Historical Review from 1988 to 1995*, by David E. Lockwood and George Siehl. President Ronald Reagan’s Grace Commission, formally known as the Private Sector Survey on Cost Control, was another prominent review commission. However, it was not created by statute and involved Congress less than many statutorily created commissions. For more information, see CRS Report RL31446, *Reorganizing the Executive Branch in the 20th Century: Landmark Commissions*.

Congress has many options to weigh if it chooses to consider a commission proposal instead of, or along with, other alternatives. (Three alternatives or complements are discussed later in this report.) The following subsections of the report analyze six types of issues that Congress might consider in the context of a commission proposal. As noted earlier, they are:

- the commission's membership;
- the scope of the commission's review and recommendations;
- definitions of key terms;
- standards and criteria for decision making;
- expedited congressional consideration of the commission's recommendations;
- and
- transparency and participation.

Each subsection cites some of the potential implications, advantages, and disadvantages that might accompany a number of choices that Congress could make, using the CARFA legislation's provisions (from H.R. 2470 and S. 1155, 109th Congress) as a point of comparison.

Commission Membership

When considering the advantages and disadvantages of a review commission proposal, several topics relating to the commission's membership may be of interest to Members of Congress and stakeholders. For the CARFA legislation, these include how the membership is to be determined, coverage of the Federal Advisory Committee Act, and coverage of conflict of interest laws. In addition, the breakdown of a CARFA commission's membership between federal and non-federal members would have significant implications for the coverage of these laws and the commission's operations.

Appointment and Removal

One of the key parameters of a statutorily created commission is how its membership is to be determined. Under the House version of the CARFA legislation, H.R. 2470, all 12 commission members would be appointed by the President, thus giving the President considerable influence over the commission's views, activities, and recommendations. Proponents might view this arrangement as giving a President necessary flexibility to exert influence over the commission's views, while ensuring Congress would still be able to reject the commission's recommendations. Critics, however, might see this provision as giving too much legislative power to a President, especially in view of the legislation's provisions for expedited congressional consideration (including a prohibition on Senate filibusters)⁶¹ and the legislation's potential policy implications for a large set of federal agencies and programs. By contrast, the Senate version of the CARFA legislation, S. 1155, would provide that 8 of the commission's 12 members be appointed by House and Senate leaders (2 each by the Speaker and minority leader in the house, and 2 each by the Senate majority and minority leaders), and the remaining 4 by the President. Proponents might view this arrangement as a way to retain congressional control over the commission, as well as make the commission at least somewhat bipartisan. On the other hand, critics might argue that if a President and congressional leaders were to appoint members only from their respective political parties, the CARFA would always have a two-to-one ratio between parties, because the

⁶¹ Examples of expedited consideration include committee discharge after 15 calendar days, a 10-hour limitation for debate, and prohibition against amendment.

President's appointees would all go to one party. In addition, a President might prefer to have appointing authority over all commission members rather than only one-third of them.

Another potential issue relates to removal power. If the President is given statutory authority to appoint someone to a particular statutorily created office, the appointee holds that office at the pleasure of the President (even for a specified term of years) unless the statute expressly limits the President's removal power, or the nature of the duties given to the officeholder is solely adjudicatory. Therefore, for presidentially appointed commission members under either the House or Senate version of the CARFA legislation, unless "for cause" removal protection were added for members, the President could remove members at will from the commission and appoint new members.⁶² Furthermore, if the presidency changed hands during the life of the CARFA, the new President could remove the commission's members and replace them with appointees of his or her own. This removal power could make the commission's membership, activities, and recommendations responsive to the needs of the President, but, on the other hand, could disrupt the commission's activities and be seen as undermining its independence. Under the Senate version of the CARFA legislation, the Speaker of the House, the House minority leader, the Senate majority leader, and the Senate minority leader would each be required to appoint two members to the commission. Each congressional leader would also have authority to remove at will a commission member whom he or she appointed, unless "for cause" removal protection were added for commission members.⁶³

Other prominent review commissions—for example, the Hoover Commission and the BRAC commissions established under P.L. 101-510—called for alternative means of determining commissions' memberships. The Hoover Commission's statute, for example, required equal numbers of Democrats and Republicans and hybrid appointment by both the President and Members of Congress. For some observers, the Hoover Commission framework might be seen as advantageous, because it could be viewed as more bipartisan. Under that framework, however, congressionally appointed commission members are appointed by majority Members of each chamber, potentially without any involvement of minority Members. On the other hand, critics might argue that a membership selected by both majority party and minority party Members could prevent the commission from coming to consensus or generating an integrated or consistent package of recommendations.

The BRAC commission approach to appointments, by contrast, required Senate confirmation of the President's appointments as well as consultations with majority and minority leadership in the House and Senate. Supporters of the BRAC approach might argue that the approach lessens the appearance and likelihood of politicization of the commission's recommendations by giving Senators some ability to influence the President's nominations (e.g., or else the President might risk subsequent filibusters of the nominations),⁶⁴ and holds the President's legislative power in check. However, the President can circumvent the need for Senate confirmation of a commission's members by using recess appointments.⁶⁵ As demonstrated in the 2005 BRAC

⁶² The long-established rule is that in the face of statutory silence, the President's power to remove is incident to his power to appoint. See *Carlucci v. Doe*, 488 US 93, 99 (1988); *Myers v. US*, 272 US 52, 161 (1926); and *Shurtleff v. US*, 189 US 311, 318 (1903).

⁶³ See, for example, *ibid.*

⁶⁴ See CRS Report RL30360, *Filibusters and Cloture in the Senate*, by Richard S. Beth and Stanley Bach, for discussion of filibusters and the role they have played since 1980 in ensuring at least a minimal degree of bipartisan acceptance. For additional context, see also CRS Report RL30850, *Minority Rights and Senate Procedures*, by Stanley Bach; CRS Report RS20801, *Cloture Attempts on Nominations*, by Richard S. Beth; and CRS Report RL31948, *Evolution of the Senate's Role in the Nomination and Confirmation Process: A Brief History*, by Betsy Palmer.

⁶⁵ For more information, see CRS Report RS21308, *Recess Appointments: Frequently Asked Questions*, by Henry B.

round, President George W. Bush took this action on April 1, 2005, when he announced recess appointments of all nine BRAC commission members.⁶⁶ Opponents of the BRAC approach might maintain that it constrains the ability of the President to appoint nominees flexibly and, indirectly through these nominees, constrains the President's ability under a CARFA Act to recommend his preferred policies to Congress.

FACA

The CARFA legislation is silent on whether the commission would be considered an "advisory committee" that is covered by the Federal Advisory Committee Act (FACA; 5 U.S.C. Appendix 2; 86 Stat. 700).⁶⁷ If the legislation were enacted, the issue of FACA coverage might have implications regarding the commission's membership, because FACA requires that an advisory committee's membership be "fairly balanced in terms of points of view represented" (Section 5(b) of FACA). FACA defines a covered "advisory committee" to include any committee or similar group that is (1) established by statute or organization plan, (2) established or utilized in the interest of obtaining advice or recommendations for the President or one or more federal agencies, and (3) not composed wholly of full-time federal officers or employees.⁶⁸ Because the commission would submit its recommendations primarily to Congress (see Section 3(b) of the CARFA legislation), not to the President or an agency, it appears a CARFA might not fall within FACA's definition of "advisory committee" and therefore might not be covered by FACA. However, Section 3(f) of the legislation calls for a "report," containing the commission's plan (with recommendations) and proposed legislation, to be submitted to both the President and Congress.⁶⁹ Therefore, unless a court were to address this question, it is not clear whether the commission would be covered by FACA. Some observers might prefer that a CARFA, if established, not be covered by FACA, in order to allow appointment of members without the statutory obligation to appoint a commission that is "fairly balanced" and therefore give flexibility to appoint members with the views, skills, and backgrounds an appointing authority wishes. However, other observers might criticize this approach as one too easy to politicize and

Hogue; and CRS Report RL33009, *Recess Appointments: A Legal Overview*, by T.J. Halstead.

⁶⁶ See CRS Report RL32216, *Military Base Closures: Implementing the 2005 Round*, by David E. Lockwood.

⁶⁷ Statutes that create review commissions often contain language that expressly says whether FACA shall, or shall not, apply to the commission. See, for example, Sec. 606 of the legislation that established the National Commission on Terrorist Attacks Upon the United States (commonly referred to as the 9/11 Commission; P.L. 107-306; 116 Stat. 2408, at 2412), which stated that FACA shall not apply to the 9/11 Commission. For discussion of FACA, see CRS Report RL30260, *Federal Advisory Committees: A Primer*, by Stephanie Smith; and CRS Report RL30795, *General Management Laws: A Compendium*, entry for "Federal Advisory Committee Act" in section I.G. of the report, also by Stephanie Smith.

⁶⁸ Sec. 3 of FACA. For discussion, see Administrative Conference of the United States, *Federal Administrative Procedure Sourcebook*, 2nd ed. (Washington: GPO, 1992), pp. 571-575; Harry A. Hammitt, David L. Sobel, and Mark S. Zaid, eds., *Litigation Under the Federal Open Government Laws 2002* (Washington: EPIC Publications, 2002), p. 362; and Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking*, 3rd ed. (Chicago: American Bar Association, 1998), pp. 125-127. If the CARFA were composed wholly of full-time federal officers and employees, however, FACA would not cover the proposed commission.

⁶⁹ This provision's inclusion of the President as a recipient of the commission's recommendations appears to be a matter of comity between the branches, because the legislation appears designed to provide information for congressional consideration and does not task the President with any formal role in considering the commission's recommendations. That said, the legislation also does not prohibit the President's involvement in formulating, influencing, or acting upon the commission's recommendations, either directly by influencing commission members or indirectly through the President's appointment and removal powers.

instead prefer that FACA cover the commission, in order to help ensure that a balance of views is present during the commission's work.

Conflict of Interest Laws and Regulations

Conflict of interest matters might also be of concern to some observers, regarding the CARFA legislation. In general, certain government officials in the executive and legislative branches must comply with conflict of interest laws and regulations (18 U.S.C. §§ 202-209; 5 C.F.R. § 2635) relating to financial disclosure, disqualification (recusal), and divestiture.⁷⁰ The CARFA legislation is silent with regard to the commission's location in the executive or legislative branch. The legislation also does not say directly whether non-federal CARFA members (i.e., those who are not officers or employees of the federal government) would nevertheless be considered officers or employees of the federal government for purposes of conflict of interest laws. Even so, based on the legislation's provisions, it appears that non-federal commission members would not be considered officers or employees of the federal government for purposes of conflicts of interest. For example, non-federal members of the commission would not be compensated; Section 5(a) of the legislation makes explicit reference to some CARFA members potentially not being officers or employees of the federal government; and Section 5(c)(3)(B) states that commission members would not be federal employees under several provisions of Title 5, *U.S. Code*. It appears these members would therefore not be subject to any federal conflict of interest laws or regulations. However, if CARFA were deemed an advisory committee under FACA, or if commission members were deemed federal employees or "special government employees" (SGEs), then the conflict of interest provisions would probably apply.⁷¹

Even if the conflict of interest laws and regulations were deemed not to apply to non-federal commission members, some observers might still raise conflict of interest concerns. Previously, for example, President Ronald Reagan's Private Sector Survey on Cost Control (popularly known as the Grace Commission) was established by executive order on June 30, 1982, as an advisory committee under FACA.⁷² The commission's activities were sometimes controversial. The commission was funded and staffed by the private sector, with 161 presidentially appointed members of an executive committee (mostly chief executive officers of corporations) and approximately 2,000 staff over the commission's life, who were loaned from their companies and organizations.⁷³ Some Members of Congress and the public expressed concerns about potential conflicts of interest, because some members of the commission were assigned to review agencies that, in turn, regulated the members' companies.⁷⁴ Similar concerns might again be voiced if a

⁷⁰ See CRS Report RL31822, *Entering the Executive Branch of Government: Potential Conflicts of Interest with Previous Employments and Affiliations*, by Jack Maskell. For example, members of the 9/11 Commission were subject to financial disclosure requirements.

⁷¹ For more information, see U.S. Office of Government Ethics, "Members of Federal Advisory Committees and the Conflict-of-Interest Statutes," memorandum from J. Jackson Walter, Director, to Heads of Departments and Agencies of the Executive Branch, Advisory Opinion 82 x 22, July 9, 1982, available at http://www.usoge.gov/pages/advisory_opinions/1982opinions.html; and U.S. Office of Government Ethics, "SGEs and Representatives on Federal Advisory Committees," memorandum from Marilyn L. Glynn, Acting Director, to Designated Agency Ethics Officials, DO-04-022, July 19, 2004, available at <http://www.usoge.gov/pages/daeograms/2004daeolist.html>.

⁷² Executive Order 12369, "President's Private Sector Survey on Cost Control in the Federal Government," 3 C.F.R. 1983 Comp., pp. 190-192.

⁷³ CRS Report RL31446, *Reorganizing the Executive Branch in the 20th Century*, pp. 84-85.

⁷⁴ For example, see David Burnham, "Questions Rising Over U.S. Study and Role of Company Executives," *New York Times*, Sept. 28, 1982, p. A1. See also U.S. Congress, Senate Committee on Governmental Affairs, *Oversight of the Implementation of the Grace Commission Report*, hearing, 99th Cong., 1st sess., May 9, 1985, S.Hrg. 99-159 (Washington: GPO, 1995), pp. 81-82. More recently, President George W. Bush's first nominee for chairman of the

CARFA were established, because commission members who have financial, political, or other interests in making certain recommendations for Congress's expedited consideration could potentially be appointed.

Implications of Composition of Federal and Non-Federal Members

If the CARFA legislation were enacted, the composition of commission members between federal and non-federal individuals would have significant implications for the coverage of FACA and conflict of interest laws and, possibly, for perceptions of the commission's recommendations. Following from the preceding analysis, three scenarios present themselves:

- If all CARFA members were federal (i.e., officers or employees of the federal government), FACA *would not* cover the commission, but commission members *would* be subject to conflict of interest statutes and regulations.
- If all CARFA members were non-federal, FACA *might or might not* cover the commission, and it appears the commissioners *would not* be subject to conflict of interest laws and regulations.
- If a CARFA commission's membership were mixed between federal and non-federal members, FACA *might or might not* cover the commission, and some members would be subject to conflict of interest laws, while others apparently would not.

Each of the three scenarios would have implications for the operations of the commission and also, perhaps, for how the commission's recommendations might be perceived by Congress and the public. However, the specific perceptions would likely differ depending on a particular observer's views about FACA, the conflict of interest laws, other provisions of the CARFA legislation (including its scope and provisions for expedited congressional consideration), and potential alternative approaches to the questions a review commission had been charged to help address.

Scope of Commission Review and Recommendations

Previous review commissions have had varied scope, ranging from narrow (e.g., for the BRAC commissions, closure and realignment of military installations) to broad (e.g., for the Hoover Commission, operations, organization, and policy of the entire executive branch). If the House version of the CARFA legislation were enacted, the scope would be executive branch agencies and programs, *excluding* DOD, entitlement programs, and agencies that solely administer entitlement programs. If the Senate version were enacted, the scope would be all executive branch agencies (including the EOP) and programs.

In the House version, the CARFA-covered programs are typically referred to as "non-defense discretionary" programs. In FY2003, they constituted 19.5% of total federal outlays, or \$420.5 billion (\$391.1 billion in inflation-adjusted, FY2000 dollars).⁷⁵ The corresponding actual figures

9/11 Commission, former Secretary of State Henry A. Kissinger, resigned from the 9/11 Commission after the Senate Ethics Committee said in a letter that the commission's members must file financial disclosure reports. For press coverage, see Dan Eggen, "Kissinger Quits Post As Head of 9/11 Panel; Withdrawal a Setback for White House," *Washington Post*, Dec. 14, 2002, p. A1. For the Senate Ethics Committee letter, see <http://ethics.senate.gov/downloads/pdffiles/wh121202.pdf>. According to the press report, a senior Bush White House official said that "onerous disclosure demands by Congress provide a 'disincentive for good people to serve in government.'"

⁷⁵ See U.S. Office of Management and Budget, *Budget of the United States Government, Fiscal Year 2006, Historical Tables* (Washington: GPO, 2005), pp. 125-127. OMB subsequently corrected constant dollar amounts in the PDF

for FY2004 were 19.3% of total federal outlays, or \$441.4 billion (\$401.3 billion in FY2000 dollars); and estimates for FY2005 were 18.8% of total federal outlays, or \$466.4 billion (\$412.2 billion in FY2000 dollars). According to the President's FY2006 budget proposal, non-defense discretionary funding was estimated to decline to 15.5% of total outlays by FY2010, or \$469.5 billion (\$363.9 billion in FY2000 dollars, an 11.7% cut in funding compared to the FY2005 level). According to Senate hearing testimony from the 108th Congress, regarding S. 1668, the proposed CARFA Act's scope was explicitly worded to address non-defense discretionary agencies and programs "as a reasonable first step."⁷⁶ Were an eventual CARFA deemed successful by Congress, Senator Brownback suggested future rounds could be authorized. However, Senator Brownback's bill in the 109th Congress, S. 1155, expanded the scope, apparently in response to the hearing on S. 1668 in the previous Congress.

Potential advantages of an incremental approach—e.g., beginning with non-defense discretionary programs—might be to make a commission's workload more manageable and to build the framework's credibility for potential future "rounds," as with the BRAC commissions. However, some testimony on the CARFA legislation suggested that the legislation's scope be expanded to include all executive branch agencies and programs, as well as "targeted tax incentives,"⁷⁷ which are often called "tax expenditures."⁷⁸ According to one analysis, when tax expenditures are expressed in terms that allow comparison with direct federal outlays, tax expenditures totaled nearly 51% of federal outlays in FY2002.⁷⁹ A potential advantage of broadening the scope to all agencies and tax expenditures might be to assess public policies from a more holistic perspective—regardless of whether policies are associated with annual or permanent appropriations, or direct federal outlays or tax expenditures—because diverse agencies and policy tools might be targeted at the same or similar public policy problems. In addition, some observers might argue that broadening the commission's scope to include all agencies and tax expenditures would be necessary to avoid the appearance of partisanship.

version of this volume, available at <http://www.whitehouse.gov/omb/budget/fy2006/pdf/hist.pdf>. For figures from the Congressional Budget Office, see U.S. Congressional Budget Office, *Budget and Economic Outlook: Fiscal Years 2006-2015*, Jan. 2005, Appendix F, p. 140. For a discussion of non-defense discretionary spending in the context of the federal government's budget deficit, see CRS Report RS21756, *The Option of Freezing Non-defense Discretionary Spending to Reduce the Budget Deficit*, by Gregg Esenwein and Philip D. Winters.

⁷⁶ Prepared statement of Sen. Brownback, Senate Subcommittee Hearing on CARFA, p. 30. The legislation presumably would allow the commission to consider eliminating or realigning agencies and programs in areas concerning homeland security and (non-DOD) intelligence agencies, which have been subjects of extensive legislative action in recent years.

⁷⁷ Prepared statement of Paul Weinstein Jr., *ibid.*, p. 55.

⁷⁸ *Tax expenditures* are generally defined as revenue losses (reductions in tax liabilities) from preferential provisions in tax laws. For an overview of the federal tax systems and concepts including tax expenditures, see CRS Report RL32808, *Overview of the Federal Tax System*, by David L. Brumbaugh, Gregg A. Esenwein, and Jane G. Gravelle. For analysis of federal tax expenditures, see U.S. Congress, Senate Committee on the Budget, *Tax Expenditures: Compendium of Background Material on Individual Provisions*, committee print, 108th Cong., 2nd sess., S.Prt. 108-54 (Washington: GPO, 2004). GAO has supported increased scrutiny for federal tax expenditures. See U.S. General Accounting Office, *Tax Policy: Tax Expenditures Deserve More Scrutiny*, GAO/GGD/AIMD-94-122, June 1994.

⁷⁹ For a breakout of tax expenditures by "budget function" and compared in size with federal outlays in the same functional areas, see CRS Report RS21710, *Tax Expenditures Compared with Outlays by Budget Function: Fact Sheet*, by Nonna A. Noto. In the context of budgetary accounting, the term *function* refers to categories of federal spending, organized according to the purpose or mission of government (e.g., income security, energy, and international affairs). The Congressional Budget and Impoundment Control Act of 1974 established the first statutory foundation for budget function classifications (see 2 U.S.C. § 632(a)(4) and 31 U.S.C. § 1104(c)). For background on budget function classifications, see CRS Report 98-280, *Functional Categories of the Federal Budget*, by Bill Heniff Jr.; U.S. General Accounting Office, *Budget Function Classifications: Origins, Trends, and Implications for Current Uses*, GAO/AIMD-98-67, Feb. 1998; and U.S. General Accounting Office, *Federal Budget: Agency Obligations by Budget Function and Object Classification for Fiscal Year 2003*, GAO-04-834, June 2004.

Other options regarding a review commission's scope might be of interest to Congress. For example, if Congress chose to consider the legislation's scope, other policy tools like loans, loan guarantees, tax laws, and regulations could also be explicitly included under the legislation's definition of *program*, which, as introduced, was defined as "any activity or function of an agency" (Section 3(a)(3)). It is not clear that this definition of *program* would necessarily include these and other policy instruments in the commission's scope. Moreover, Section 3(d) of the legislation contains provisions related to program assessments that are arguably similar in structure and content to the Administration's PART, an instrument that is focused on evaluating the use of appropriated funds. Thus, to the extent that the PART is seen as an essential or complementary tool for the CARFA, and possibly as the "systematic method for assessing the effectiveness and accountability of agency programs" that is required by the legislation's Section 3(d), a CARFA might tend to concentrate on appropriated funds to the exclusion of other policy tools.

Definitions of Key Terms

The CARFA legislation uses a number of special terms when specifying the commission's duties, specifically, when requiring the commission to recommend *realignment* or elimination for agencies and *programs* that are deemed to be *duplicative*, *wasteful*, *inefficient*, *outdated*, *irrelevant*, or *failed*. If the proposal were enacted, its implementation and ramifications would likely turn on these definitions. Some of these terms are defined by the CARFA legislation to varying extents, and others are not defined. If the legislation were enacted as introduced, the commission's members and staff would arguably need to define further and operationalize some of the terms. Alternatively, during the course of any consideration of the legislation, Congress might elect to include more detailed definitions in the legislation or establish a legislative history demonstrating congressional intent. Each approach might bring advantages and disadvantages. For example, defining the terms later would obviously grant significant flexibility and discretion to the commission and allow commission members to modify the definitions as they proceed with the commission's work. However, this discretion could also potentially open up the commission's actions to charges of bias in the absence of clear or consensus definitions. In view of these tensions, definitions of key terms might be of interest to Congress in consideration of the CARFA Act.

Program

The CARFA legislation defines *program* as "any activity or function of an agency."⁸⁰ The term *activity* is not defined in the legislation, but according to *Merriam-Webster's Collegiate Dictionary*, is defined as "a pursuit in which a person is active" or "an organizational unit for performing a specific function; *also*: its function or duties."⁸¹ Thus, an activity can be what a person or an organization does or, alternatively, a distinct part of an organization. The term *function* is used in several contexts in Title 5 of the *U.S. Code*, the codification of laws on government organization and employees. While Title 5 does not define *function*, the implementing regulations for transfer of functions (5 U.S.C. § 3503) and reductions in force (5 U.S.C. § 3502) define the term as "all or a clearly identifiable segment of an agency's mission (including all integral parts of that mission), regardless of how it is performed" (5 C.F.R. § 351.203). In sum, a CARFA would have considerable discretion in identifying the "programs" it wished to evaluate.

⁸⁰ GAO, OMB, and scholars have offered differing definitions of the term *program*.

⁸¹ *Merriam-Webster's Collegiate Dictionary*, 11th ed. (Springfield, MA: Merriam-Webster, Inc., 2003), p. 13.

OMB has used primarily a budgetary perspective for defining specific programs for purposes of the PART, an instrument used in the last two years in the President's budget to evaluate the effectiveness of programs. Under the PART, *programs* have generally been defined as they are presented in the President's budget proposals or other budget documents. GAO has noted, however, that OMB's approach sometimes aggregated several separate programs, and at other times disaggregated programs, in ways that were not always aligned with how agencies managed or organized themselves. This practice in turn "contributed to the lack of available planning and performance information," as observed by GAO.⁸² GAO noted that the PART must serve the needs of the President and OMB, but that the Government Performance and Results Act (GPRA; 107 Stat. 285) presents a broader framework for strategic planning and consultation with stakeholders, including Congress.⁸³ These tensions raise the questions of how Members and committees of Congress could best be served with regard to how programs should be defined, and who should define them.

Realignment

The CARFA legislation calls upon its commission members to recommend certain programs and agencies for *realignment*, but does not define the term. The BRAC commission law, by contrast, provided a technical and applied definition for the term *realignment*, in the context of deciding whether to close, cut back, or reorganize military installations: "The term 'realignment' includes any action which both reduces and relocates functions and civilian personnel positions but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances."⁸⁴ Unless the term were further defined by Congress, a CARFA would likely have flexibility to define the term as it wishes. Some discussion may help shed light on possible definitions. *Merriam-Webster's Collegiate Dictionary* defines *realign* as "to reorganize or make new groupings"⁸⁵ and *align* as "to be in or come into precise adjustment or correct relative position."⁸⁶ Thus, the term's common usage suggests an emphasis on reorganization. This possible emphasis is arguably consistent with Representative Tiahrt's discussion of the proposed CARFA Act in the 108th Congress, in his remarks on the House floor, which referred to the "elimination or the realignment of duplicative, wasteful, and outdated *functions*" (*italics added*).⁸⁷ The emphasis is also arguably consistent with the legislation's provision that *duplicative* programs be "consolidated or streamlined" (Section 3(c)(1)), terms often used as synonyms for restructuring and reorganization.

⁸² U.S. General Accounting Office, *Performance Budgeting: Observations on the Use of OMB's Program Assessment Rating Tool for the Fiscal Year 2004 Budget*, GAO-04-174, Jan. 2004, p. 29.

⁸³ For an overview of GPRA, see CRS Report RL30795, *General Management Laws: A Compendium*, entry for "Government Performance and Results Act of 1993" in section II.B. of the report, by Genevieve J. Knezo. A proposal for amending GPRA was reported favorably by the House Committee on Government Reform in the 108th Congress (H.R. 3826). For more information, see CRS Report RL32671, *Federal Program Performance Review: Some Recent Developments*, by Virginia A. McMurtry. In the 109th Congress, a similar measure, H.R. 185, was reported favorably by the House Committee on Government Reform. For more information, see CRS Report RL32164, *Performance Management and Budgeting in the Federal Government: Brief History and Recent Developments*, by Virginia A. McMurtry.

⁸⁴ P.L. 101-510, Sec. 2910, "Definitions" (104 Stat. 1485, at 1819).

⁸⁵ *Merriam-Webster's Collegiate Dictionary*, p. 1036.

⁸⁶ *Ibid.*, p. 31.

⁸⁷ Rep. Todd Tiahrt, "Yes, We Are Better Off Now Than We Were Four Years Ago," remarks in the House, *Congressional Record*, p. H3534.

The organization design literature often indicates that an organization's "structure" and "purpose" are complexly intertwined concepts when considering "organizational architectures."⁸⁸

Depending on an observer's perspective, these concepts may arguably be intertwined to such an extent that the terms *reorganization* or *realignment* can be construed to imply not only "moving organizational boxes," but also changing processes and perhaps even purpose. For example, if two similar, but not identical, programs are proposed to be combined into one program, it is possible that core elements of one or both programs might be changed. Thus, it is possible that the proposed commission could define the term *realignment* as allowing both organizational and *policy* changes,⁸⁹ consistent with the CARFA legislation's directions to recommend the realignment of programs, and corresponding policies, that are judged *duplicative*, *wasteful*, or *inefficient*.

Other Terms to Describe Certain Programs

Section 3(c) of the CARFA legislation enumerates a number of descriptive terms that a commission would be required to use in its work and would potentially need to define further. Specifically, under the legislation, a commission would be *required* to recommend programs or agencies that fall under most of these definitions to be realigned or eliminated. (However, the Senate version of the CARFA legislation, S. 1155, would allow rather than require realignment or elimination of agencies or programs found to be *wasteful* or *inefficient*.)

Duplicative. Section 3(c)(1) of the CARFA legislation would require a CARFA to recommend that *duplicative* agencies and programs be *realigned*. The definition of *duplicative* is operationalized in this way: "[i]f 2 or more agencies or programs are performing the same essential function and the function can be consolidated or streamlined into a single agency or program." How would a commission interpret this term? The term has a long history. Concerns about "overlap" and "duplication" in federal government programs were expressed as early as 1920, when Congress established a Joint Committee on Reorganization.⁹⁰ Similar concerns were echoed in the late 1940s, when the legislation enacting the Hoover Commission was being considered. The Hoover Commission's concluding report prominently remarked on "the wastes of overlapping and duplication."⁹¹ More recently, other terms, in addition to *duplicative* and *overlapping*, have been used to describe several agencies or programs engaging in activities that some observers see as similar or related. These terms include *crosscutting*, *fragmented*, and *redundant*. GAO's analysis of *mission fragmentation* and *program overlap* in federal agencies, for example, provides the analytical foundation for much of the current discourse regarding federal programs that appear to do similar or related things.⁹² An underlying framework that GAO used for making these categorizations is the federal government's set of budget function

⁸⁸ For example, see David A. Nadler and Michael L. Tushman, *Competing by Design* (New York: Oxford University Press, 1997), pp. 7-10.

⁸⁹ The record of "reorganization commissions" from the last century illustrates how organizational structure and policy have been often intertwined. See, for example, CRS Report RL31446, *Reorganizing the Executive Branch in the 20th Century: Landmark Commissions*; and Peri E. Arnold, *Making the Managerial Presidency: Comprehensive Reorganization Planning 1905-1996*.

⁹⁰ 40 Stat. 1083, Dec. 29, 1920. For discussion, see CRS Report RL31446, *Reorganizing the Executive Branch in the 20th Century: Landmark Commissions*.

⁹¹ U.S. Commission on Organization of the Executive Branch of the Government, *Concluding Report*, vol. 5 (Washington: GPO, 1949), p. 27.

⁹² See U.S. General Accounting Office, *Managing for Results: Barriers to Interagency Coordination*, GAO/GGD-00-106, Mar. 2000; and U.S. General Accounting Office, *Managing for Results: Using the Results Act to Address Mission Fragmentation and Program Overlap*, GAO/AIMD-97-146, Aug. 1997.

classifications, which, as noted previously, refer to broad categories of federal spending, organized according to the purpose or mission of government (e.g., defense, income security, and law enforcement).⁹³ However, GAO offered the following caveat with regard to the term *duplication*:

Although [the budget function classification] system can indicate broad categories of fragmentation and overlap, it does not directly address the issue of program duplication. While mission fragmentation and program overlap are relatively straightforward to identify, determining whether overlapping programs are actually duplicative requires an analysis of target populations, specific program goals, and the means used to achieve them.⁹⁴

Furthermore, when appearing before the House Committee on Government Reform's Subcommittee on Government Efficiency and Financial Management, a former OMB career official testified that making such assessments involves several subtleties. He stated that, while some programs might be "in competition with one another" (i.e., duplicative), it is also possible that similar programs might use different methods, serve different populations, or even be complementary to each other.⁹⁵

Wasteful, Inefficient, Outdated, Irrelevant, or Failed. The other terms in Section 3(c) of the CARFA legislation have less complex histories, but also might be more difficult to define in ways that would achieve consensus among varied stakeholders and observers. Section 3(c)(2) defines *wasteful* and *inefficient* in three possible ways, either requiring (House version of the CARFA legislation) or allowing (Senate version) the proposed commission to "recommend the realignment or elimination of any agency or program that has wasted Federal funds by—(A) egregious spending; (B) mismanagement of resources and personnel; or (C) use of such funds for personal benefit or the benefit of a special interest group." Similarly, Section 3(c)(3) would require the proposed commission to "recommend the elimination of any agency or program that—(A) has completed its intended purpose; (B) has become irrelevant; or (C) has failed to meet its objectives."

How would the commission define "egregious" spending, or determine the threshold for what constitutes "mismanagement" of resources and personnel? What is a "special" interest group? How does it differ from other interest groups that are not "special"? What constitutes an *outdated*, *irrelevant*, or *failed* program or agency? The legislative history behind the CARFA legislation does not appear to answer these questions, and the answers would likely need to be supplied by Congress or the commission's presidential appointees (House version) or mix of presidential and congressional appointees (Senate version). Advocates of these provisions might argue that it is proper to give the commission flexibility to define these terms, and that in any case their recommendations, packaged as an implementation bill, would still be subject to an up-or-down vote by Congress. However, critics might argue that the terms are inherently subjective, and that the legislation's expedited procedures for congressional consideration (discussed and analyzed further, below) would not allow sufficient scrutiny of a commission's recommendations and implementation bill.

⁹³ For background on budget function classifications, see CRS Report 98-280, *Functional Categories of the Federal Budget*, by Bill Heniff Jr.; and U.S. General Accounting Office, *Budget Function Classifications: Origins, Trends, and Implications for Current Uses*, GAO/AIMD-98-67.

⁹⁴ U.S. General Accounting Office, *Managing for Results: Barriers to Interagency Coordination*, p. 3.

⁹⁵ Testimony of Jonathan D. Breul in U.S. Congress, House Committee on Government Reform, Subcommittee on Government Efficiency and Financial Management, *Should We PART Ways With GPRA: A Look at Performance Budgeting and Program Review*, hearing, 108th Cong., 2nd sess., Feb. 4, 2004 (Washington: GPO, 2004), pp. 63-64.

If a commission were to craft definitions for these terms, it is possible that the commission would create and use standards for making some of these decisions, as discussed in the following section.

Standards and Criteria for Decision Making

The subject of decision making standards arose during the hearing in the 108th Congress for S. 1668, with Senator Voinovich discussing a need to establish non-biased criteria for recommending the elimination of programs.⁹⁶ Former Majority Leader Arney also testified that politics should not be allowed to intrude in such a process. OMB Deputy Director for Management Clay Johnson III testified that a commission should use the Bush Administration's PART to help make its determinations. Section 3(d) of the CARFA legislation, which would require "systematic assessment of programs" by the President and the commission's consideration of these assessments, contains a framework of provisions that is arguably similar in structure and contents to the Administration's PART.⁹⁷

If Congress chose to evaluate the CARFA legislation, Congress would have precedent for paying close attention to a commission's standards and criteria for making recommendations. In the BRAC statute, for example, the Secretary of Defense was required to articulate and publish in the *Federal Register* the proposed criteria for base closures, with an opportunity for public comment (104 Stat. 1810-1811; Section 2903(b)).⁹⁸ Should Congress wish to explore the topic of standards, three perspectives from the program evaluation and social science literatures might be helpful in assessing standards that could be used by an eventual CARFA: the concepts of *validity*, *reliability*, and *objectivity*.⁹⁹ In program evaluation and social science research, *validity* has been defined as "the extent to which any measuring instrument measures what it is intended to measure."¹⁰⁰ Another term, *reliability*, has been described as "the relative amount of random inconsistency or unsystematic fluctuation of individual responses on a measure," that is, the extent to which several attempts at measuring something are consistent (e.g., by several human judges or several uses of the same instrument).¹⁰¹ Finally, the term *objectivity* has been defined as "whether [an] inquiry is pursued in a way that maximizes the chances that the conclusions reached will be true."¹⁰² The opposite concept is *subjectivity*, suggesting, in turn, concepts of bias,

⁹⁶ For media coverage, see Amelia Gruber, "OMB Backs Congressional Effort to Review Programs," *GovExec.com*, May 7, 2004.

⁹⁷ As noted earlier in this report, bills nearly identical to S. 1668/H.R. 3213 (108th Cong.) were introduced in the summer of 2002 in the 107th Congress (S. 2488/H.R. 5090) by the same sponsors, before issuance of the Bush Administration's PART. The previous bills did not include the language on "systematic assessment of programs" (Sec. 3(d)).

⁹⁸ For discussion, see CRS Report 97-305, *Military Base Closures: A Historical Review from 1988 to 1995*.

⁹⁹ These concepts are discussed in more detail in CRS Report RL32663, *The Bush Administration's Program Assessment Rating Tool (PART)*, in the section entitled "Potential Criteria for Evaluating the PART or Other Program Evaluations."

¹⁰⁰ See Edward G. Carmines and James Woods, "Validity," in Michael S. Lewis-Beck, Alan Bryman, and Tim Futing Liao, eds., *The SAGE Encyclopedia of Social Science Research Methods*, vol. 3 (Thousand Oaks, CA: SAGE Publications, 2004), p. 1171. The authors elaborate: "Thus, the measuring instrument itself is not validated, but the measuring instrument [is validated] in relation to the purpose for which it is being used."

¹⁰¹ See Peter Y. Chen and Autumn D. Krauss, "Reliability," in Michael S. Lewis-Beck, Alan Bryman, and Tim Futing Liao, eds., *The SAGE Encyclopedia of Social Science Research Methods*, vol. 3, p. 952, and Michael Scriven, *Evaluation Thesaurus*, 4th ed. (Newbury Park, CA: SAGE Publications, 1991), p. 309.

¹⁰² For more information and criticisms of the concept, see Martyn Hammersley, "Objectivity," in Michael S. Lewis-Beck, Alan Bryman, and Tim Futing Liao, eds., *The SAGE Encyclopedia of Social Science Research Methods*, vol. 2, pp. 750-751.

prejudice, or unfairness. Thus, making a judgment about the *objectivity* of a test or researcher “involves judging a course of inquiry, or an inquirer, against some rational standard of how an inquiry *ought to have been pursued in order to maximize the chances of producing true findings*” (emphasis in original).¹⁰³

A framework similar to the validity/reliability/objectivity trio of concepts, as summarized above, was once used to assess a BRAC commission’s standards for decision making. Specifically, in the context of the 1995 BRAC commission’s consideration of U.S. Army bases, an independent analysis by the RAND Corporation identified 10 “criteria [that] should characterize an effective BRAC process.”¹⁰⁴ The first criterion used by RAND focused on the *reliability* of the assessment process; the second criterion focused on *objectivity*; and the remaining eight criteria arguably focused on several dimensions of *validity*.

With regard to the CARFA legislation, a commission would need to make numerous determinations for non-defense discretionary programs in the executive branch (whether a program is *duplicative*, *wasteful*, etc.). How should one *validly*, *reliably*, and *objectively* determine a program is *irrelevant*, for example? General consensus among stakeholders and researchers might exist on how to make these determinations for some “programs,” as the commission elects to define the term *program*. But consensus might be lacking for other programs. Should Congress wish to explore these issues, Congress could ask if the CARFA legislation’s assessments might be completed validly, reliably, and objectively—including by the Administration’s PART, an instrument which has been lauded by some observers and the subject of criticism among others.¹⁰⁵ To the extent that the PART is seen as an essential or complementary tool for a CARFA (and probably as the “systematic method” required by the legislation’s Section 3(d)), perspectives on the PART may help highlight or clarify issues for Congress should it consider the proposed CARFA Act.

Expedited Congressional Consideration

A distinctive feature of the CARFA legislation is its provision for expedited consideration by Congress of the commission’s recommendations, packaged together in an implementation bill.¹⁰⁶ Depending on an observer’s outlook, these arrangements could be considered to offer distinct advantages or disadvantages. For example, possible advantages include the assurance that Congress would actually consider the work of the commission, less ability for Members to engage in “logrolling” (vote trading) that could undermine the commission’s recommendations, and the prevention of potential filibusters in the Senate. Possible disadvantages, however, include less ability to engage in the compromises that are necessary for a democratic system to function,

¹⁰³ Ibid., p. 750. Thus, analysts often ask whether a given instrument can be improved (i.e., whether the instrument’s chances of reaching valid and reliable findings have been maximized). An implication of these terms is that it is possible for an instrument to be objective, but not a valid measure of what it is intended to measure.

¹⁰⁴ See William M. Hix, *Taking Stock of the Army’s Base Realignment and Closure Selection Process* (Santa Monica, CA: RAND, 2001), pp. xv-xvii. The RAND Corporation is a public nonprofit 501(c)(3) corporation whose mission is to “help improve policy and decisionmaking through research and analysis” (<http://www.rand.org/about/history>).

¹⁰⁵ For analysis of the PART along these dimensions, see CRS Report RL32663, *The Bush Administration’s Program Assessment Rating Tool (PART)*.

¹⁰⁶ If Congress chose to enact the CARFA proposal, it is possible that Congress’s involvement with the commission would begin long before consideration of the actual implementation bill. For example, the commission might engage in multi-party negotiations with the President, Congress, and other entities or interest groups before submitting its final implementation bill. For an overview of expedited legislative procedures, see CRS Report RS20234, *Expedited or “Fast Track” Legislative Procedures*. For a more detailed discussion, see CRS Report 98-888, *“Fast Track” or Expedited Procedures: Their Purposes, Elements, and Implications*.

diminished power for minority groups in the Senate, and a movement away from the rights and prerogatives of individual Senators to engage in extended debate unless an extraordinary majority votes to invoke cloture. The advantages and disadvantages relating to logrolling and constraint on Members of the Senate are discussed below.

Logrolling and the CARFA Legislation

When the BRAC commission legislation was being considered in 1990, there was a broad consensus that the number and extent of military installations needed to be reduced in order to save funds.¹⁰⁷ Supporters of the BRAC process argued that parochial politics prevented the closure of bases which they believed were no longer needed. Critics countered that it was Congress's responsibility to make these determinations, not a commission's, and that presidential administrations had in the past used base closing decisions for political purposes. In addition, there were many concerns about *how* these military installations were to be chosen. If a commission's recommendations could be amended during the legislative process, Members of Congress could face strong incentives to exclude some or all installations from the list, perhaps via bartering votes on base closures with votes on other seemingly unrelated matters. If this happened to a large extent, then the primary reason for pursuing the BRAC process, saving funds, might be undermined. Thus, one justification for creating the BRAC commission framework was that it would prevent, or at least limit, vote trading, or "logrolling."¹⁰⁸

Under the BRAC framework, when a commission's recommendations reached Congress, Congress would be allowed only an up-or-down vote on a resolution disapproving the package in its entirety, with no amendments. If no such resolution were passed within 45 days, the recommendations would then be automatically implemented. Members of Congress would not be able to make deals to exclude installations from the list of facilities to be realigned or closed, which would preserve the integrity of the original list and its corresponding (projected) budget savings, as recommended by the commission and transmitted by the President. These provisions, together with additional ones to help insulate the process from political manipulation by presidential administrations and make it open to the public, became what were considered key attributes of the BRAC statute.¹⁰⁹

Concerns about logrolling were expressed by the House sponsor of the proposed CARFA Act, Representative Tiahrt, during the 108th Congress:

CARFA is based on a process with an established record of successful program elimination and prioritizing of spending. The Base Realignment and Closure Commission, or BRAC as it is called, is similar only [in how] it deals strictly with military bases, whereas H.R. 3213 will establish a commission to conduct a comprehensive review of Federal agencies

¹⁰⁷ For more discussion, see CRS Report 97-305, *Military Base Closures: A Historical Review from 1988 to 1995*.

¹⁰⁸ See discussion in Ronald G. Shaiko, "Logrolling," in Donald C. Bacon, Roger H. Davidson, and Morton Keller, eds., *The Encyclopedia of the United States Congress* (New York: Simon & Schuster, 1995), pp. 1314-1315. Shaiko defines *logrolling* as

a means of organizing legislative majorities by coupling similar or, at times, disparate legislative initiatives that separately would have difficulty passing a various stages of the legislative process, but combined, would garner support of a majority of numbers, either at the committee level or when a bill reaches the floor for a vote of all members.

¹⁰⁹ For a discussion of the BRAC commissions in the context of political science theories regarding delegation of legislative power, see David Epstein and Sharyn O'Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making Under Separate Powers* (Cambridge, UK: Cambridge University Press, 1999), pp. 1-4, 9.

and programs and recommend the elimination or the realignment of duplicative, wasteful, and outdated functions.

CARFA provides for a disciplined spending review process for nondefense, nonentitlement programs. Congress will simply have to vote up or down on the commission's recommendations in their entirety. The congressional logrolling that normally bogs down the process will be short-circuited. In this way, real reform can emerge and the deficit and debt program can be brought under control.¹¹⁰

According to public choice theory,¹¹¹ logrolling can improve or degrade societal welfare depending on the specifics of the situation, including how strongly different individuals value several issues and how value is to be measured.¹¹² Which of these two approaches—vote trading versus no vote trading—is better in a given situation is open to interpretation and debate.

According to one textbook,

[v]ote trading is controversial. Its proponents argue that trading votes leads to efficient provision of public goods, just as trading commodities leads to efficient provision of private goods. Proponents also emphasize the potential for revealing the intensity of preferences and establishing a stable equilibrium. Moreover, the compromises implicit in vote trading are necessary for a democratic system to function.... On the other hand, opponents of logrolling stress that it is likely to result in special-interest gains not sufficient to outweigh general losses. Large amounts of waste can be incurred.¹¹³

In sum, different stakeholders may have different views on how the CARFA legislation's no-amendment provisions would affect logrolling. Moreover, theory alone does not indicate whether logrolling (or the absence thereof) would have beneficial or adverse consequences for society as a whole, compared to the other option.

Three issues that Congress might consider, in light of this discussion, are

¹¹⁰ Rep. Todd Tiahrt, "Yes, We Are Better Off Now Than We Were Four Years Ago," remarks in the House, *Congressional Record*, pp. H3533-H3534. The proposed CARFA Act was notably different from BRAC in its provision for a vote on approval for the commission's recommendations, rather than the BRAC legislation's vote on disapproval.

¹¹¹ Public choice theory has been defined as "the economic study of nonmarket decision making, or simply the application of economics to political science." See Dennis C. Mueller, *Public Choice III* (New York: Cambridge University Press, 2003), p. 1. An alternative name for public choice theory is "political economy." See Harvey S. Rosen, *Public Finance*, p. 112. For a viewpoint on how economics has affected political science, see Gary J. Miller, "The Impact of Economics on Contemporary Political Science," *Journal of Economic Literature*, vol. 35, no. 3 (Sept. 1997), pp. 1173-1204.

¹¹² For illustrations of these scenarios, which use cost-benefit analysis, see Harvey S. Rosen, *Public Finance*, pp. 119-121. Under cost-benefit analysis, a person seeks to estimate: (a) the costs and benefits of an option for different actors (typically by denominating both costs and benefits in dollar terms); (b) the distribution of benefits and costs among individuals and groups; and (c) whether the total benefits for society outweigh the total costs (resulting in a computation of "net benefits," which can be positive or negative). In any policy decision, there will typically be "winners" (those who have positive net benefits) and "losers" (those who have negative net benefits). Many economists are uncomfortable with cost-benefit analysis, if it computes overall net benefits for an option without taking account of distributional concerns among these winners and losers, particularly if the analysis is used to justify decisions without making compensating side payments to any losers. (See, for example, Edward M. Gramlich, *A Guide to Benefit-Cost Analysis*, 2nd ed. (Englewood Cliffs, NJ: Prentice Hall, 1990), pp. 30-33; and Paul A. Samuelson and William D. Nordhaus, *Microeconomics*, 15th ed. (New York: McGraw-Hill, 1995), p. 76.) In such a case, economists argue that cost-benefit analysis is equivalent to making interpersonal comparisons of the "utility" (satisfaction), denominated in dollars, that stakeholders get from an option. According to microeconomic theory, when interpersonal utility comparisons are made without these side payments, it becomes difficult or impossible to know if an option would actually make society better off.

¹¹³ Harvey S. Rosen, *Public Finance*, p. 121.

- whether legislation based partially on the BRAC model, which targeted military bases for realignment and closure based on widespread consensus, would be appropriate for the case of reviewing non-defense discretionary agencies and programs (under the House version of the CARFA legislation) or all executive branch agencies and programs (under Senate version) for realignment or elimination, when widespread consensus might or might not exist and when the commission's membership would not require Senate confirmation;
- whether vote trading, or the lack thereof, in considering a proposed CARFA Act would be likely to improve societal welfare; and
- whether Members believe the proposal would be a fully legitimate exercise of legislative power, an abdication of that power, or something in between.

Constraint on Potential Filibusters in the Senate

Section 7 of the CARFA legislation would provide for expedited congressional consideration of the commission's implementation bill, "as an exercise of the rulemaking power of the Senate and House of Representatives."¹¹⁴ In the Senate, this provision would prohibit amendments and almost all procedural delays, unless a majority of the Senate did not wish to vote on or pass the commission's implementation bill. Thus, in contrast to customary Senate procedures, which give individual Senators considerable power to influence or delay the Senate's business, Senators would lose the ability to filibuster the implementation bill, if any wished to prevent it from coming to a vote.¹¹⁵ In other words, for purposes of considering the implementation bill, a proposed CARFA Act's expedited procedures could diminish the power of minorities in the Senate.¹¹⁶ Proponents might argue that the legislation's expedited procedure provisions would make Senate consideration of the commission's recommendations more responsive to majority rule and speed consideration of the proposal. Opponents of this approach might maintain that it takes power away from minority groups in the Senate and de-emphasizes the rights and prerogatives of individual Senators to engage in extended debate unless an extraordinary majority votes to invoke cloture.

If one or more Senators wished to modify the rules contained in the CARFA legislation (i.e., if the CARFA Act were enacted), the Senate could choose to do so by making changes to the expedited consideration provisions.¹¹⁷ This could be done in several ways. For example, the Senate could change the expedited procedures by unanimous consent. If a Senator objected to the unanimous consent request to change the expedited procedures, a super-majority of three-fifths of all Senators chosen and sworn (normally 60 votes) would be needed to invoke cloture and allow the Senate to vote on the proposed changes to the expedited procedures, by statute or standing order. And finally, invoking cloture to vote on an amendment to the Senate's standing rules would require a super-majority of two-thirds of all Senators present and voting (up to 67 votes). In the House of Representatives, by contrast, making changes to the CARFA procedural rules would require only a simple majority vote on the adoption of a special rule, something a majority could achieve easily. In essence, then, while the expedited procedures would apply equally to both chambers, in effect they would be considerably more restrictive on the Senate than on the House.

¹¹⁴ Article I, Section 5 of the Constitution provides that "Each House may determine the Rules of its Proceedings."

¹¹⁵ For more information about filibusters, see CRS Report RL30360, *Filibusters and Cloture in the Senate*.

¹¹⁶ For more on minority rights in the Senate, see CRS Report RL30850, *Minority Rights and Senate Procedures*.

¹¹⁷ Section 7(e) of the CARFA legislation notes that the House and Senate would still be able to change their rules, including the rules set out in the CARFA legislation, at any time, in "full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House)."

Transparency and Participation

Another topic that Congress could choose to consider is the transparency with which the CARFA would be required to operate and related issues of public participation. Past review commissions have worked under a wide range of requirements to open their work to public visibility, participation, and occasional accompanying scrutiny. The BRAC commissions, for example, operated under the explicit requirement that “[e]ach meeting of the Commission, other than meetings in which classified information is to be discussed, shall be open to the public” (Section 2902(e)(2)(A)). In addition, the BRAC statute specified that “[a]ll the proceedings, information, and deliberations of the Commission shall be open, upon request” to the chairmen and ranking members of several congressional committees and subcommittees (Section 2902(e)(2)(B)). By contrast, the Hoover Commission’s authorizing statute was silent on the subject of transparency and participation. (The Hoover Commission predated the enactment of FACA, which sets out requirements governing public access to meetings and records as well as public participation, and other “open government” laws.) A more recent review commission, the 9/11 Commission, was explicitly excluded from FACA’s requirements and required to hold public hearings “to the extent appropriate.”¹¹⁸

As discussed previously in this report, it is unclear whether a CARFA would be covered by FACA or affected by its requirements (e.g., advisory committee meetings are presumptively open to the public). A CARFA would also probably not be subject to the Government in the Sunshine Act (90 Stat. 1241).¹¹⁹ This law requires collegially headed federal executive agencies with two or more members—a majority of whom are appointed by the President with the advice and consent of the Senate—to hold certain meetings in public. The CARFA legislation is silent with regard to the commission’s location in the executive or another branch, but if the legislation were enacted, the commission’s members would not be Senate-confirmed.

Finally, the CARFA legislation is silent with regard to whether the proposed commission would be subject to the Freedom of Information Act (FOIA; 5 U.S.C. § 552). FOIA’s definition of “agency” (5 U.S.C. § 552(f)) includes executive departments, military departments, government corporations, government controlled corporations, independent regulatory agencies, or any “other establishment in the executive branch of the Government (including the Executive Office of the President).” However, if the commission were deemed strictly advisory in nature, it would not be covered by FOIA. If Congress chose to enact the CARFA legislation, and in the event that the commission were considered an establishment in the executive branch, FOIA would likely be held to cover the commission (based on the fact that, under Section 4 of the legislation, the CARFA would have investigatory powers), if a court were to address this question. In *Energy Research Foundation v. Defense Nuclear Facilities Safety Board*, 917 F.2nd 581 (D.C. Cir. 1990), the court held that the board (which was responsible for reviewing, evaluating, investigating, and making recommendations to the Department of Energy regarding standards and safety issues pertaining to nuclear facilities of the department) was subject to FOIA, basing its decision on the fact that the board had investigatory powers.¹²⁰

¹¹⁸ The 9/11 Commission, a hybrid commission with members appointed by the President and by Congress, was also explicitly bipartisan in its composition.

¹¹⁹ For more information on the Government in the Sunshine Act, see CRS Report RL30795, *General Management Laws: A Compendium*, entry for “Government in the Sunshine Act” in section I.H. of the report, by Henry B. Hogue.

¹²⁰ *Energy Research Foundation v. Defense Nuclear Facilities Safety Board*, 917 F.2nd 581 (D.C. Cir. 1990), at 584-585. For discussion, see James T. O’Reilly, *Federal Information Disclosure*, 3rd ed. (St. Paul, MN: West Group, 2000), pp. 57-61; and Harry A. Hammitt, David L. Sobel, and Mark S. Zaid, eds., *Litigation Under the Federal Open Government Laws 2002*, pp. 200-203. For more information on FOIA, see CRS Report RL30795, *General*

In sum, therefore, it is not clear the extent to which a CARFA would be able to conduct its work outside public and congressional view (e.g., convene meetings, hold hearings, and formulate recommendations), if it chose to pursue that course. Some might see advantages associated with an approach that kept the commission's activities largely outside public or congressional view. For example, supporters might maintain that, by limiting public involvement, a CARFA would avoid public or interest group pressure as it weighed individual and difficult policy recommendations, issue by issue. From the perspective of supporters, this could potentially help a CARFA's recommendations to be formulated, seen, and considered as a cohesive package. Furthermore, because the commission would be advisory, a CARFA's recommendations still would have to be considered by Congress (albeit under expedited procedures) and signed by the President before any recommendations became law.

However, some disadvantages could also be associated with an approach that other observers might see as lacking transparency and participation. For example, the commission's recommendations might lose credibility if observers were not sure who was involved, both inside and outside government, in formulating them. In addition, critics might argue that the legislation's expedited congressional procedures would not allow for (a) enough time or public participation to consider what could be large changes to a large subset of federal programs; or for (b) enough congressional and public input through mechanisms like GPRA, which was enacted to address many issues of federal management and performance, arguably including those that would be addressed by a CARFA, if it were established.¹²¹

Potential Success Factors for a Commission

When evaluating proposals to establish major reorganization or review commissions, Congress might also consider the "success factors" that observers have identified as important inputs to successful commissions. One scholar proposed four "propositions" for an effective commission that, if ignored, he argued could make "success" with a commission more difficult to attain:

1. A focused and limited mandate for a commission ... is more likely to provide useful results than a commission with a broad, unstructured mandate with substantial policy implications.
2. A commission should have ties with central managerial agencies in the executive branch and with committees with general management responsibilities in Congress. Others besides the commission must have a stake in the success of the exercise.
3. Commissions should be cognizant of the distinctive legal character of governmental organization and activities. Included in any commission review should be a review, with recommendations, of the general management laws pertinent to the mandate of the commission.
4. There should be some consensus in advance among commission members regarding the organizational principles to be applied in their review and

Management Laws: A Compendium, entry for "Freedom of Information Act" in section I.E. of the report, by Harold C. Relyea.

¹²¹ GPRA requires agencies to articulate strategic plans, annual plans, and measures of performance, and was explicitly intended to open up the processes of debate and decision making to the public, interest groups, and Congress through required consultations with Congress and solicitation of views from "those entities potentially affected by or interested in" these matters, with regard to agency strategic plans (5 U.S.C. § 306(d)).

recommendations. Commissions do not tend to be effective vehicles for generating consensus if none previously existed.¹²²

GAO also weighed in with “lessons” regarding “successful government restructurings”:

The lesson of the two Hoover Commissions is clear: If plans to reorganize government are to move from recommendation to reality, creating a consensus for them is essential to the task. In this regard, both the process employed and the players involved in making any specific reorganization proposals are of critical importance. The success of the first Hoover Commission can be tied to the involvement and commitment of both the Congress and the President. Both the legislative branch and executive branches agreed to the goals. A distinction also needs to be made between policy choices and operational choices. Relatively straightforward reorganization proposals that focus on operational issues appear to have met with greater success than those that addressed more complex policy issues.¹²³

Different observers will have different opinions about whether success factors such as these relate to specific commission proposals. A noteworthy point of comparison with these prescriptions may be experience with the 9/11 Commission. The 9/11 Commission was established only after extended negotiation among Members of Congress and the President regarding its scope, powers, etc., and was tasked in its authorizing statute with making not only operational recommendations, but also policy recommendations: “[t]he purposes of the Commission are to—... (5) investigate and report to the President and Congress on its findings, conclusions, and recommendations for corrective measures that can be taken to prevent acts of terrorism” (116 Stat. 2408). The 9/11 Commission proceeded to make organizational, operational, and policy recommendations in a charged political environment during a presidential election year.¹²⁴ The commission’s bipartisan, unanimous report has been both criticized and commended for omitting some policy topics,¹²⁵ and may or may not illustrate that to be effective, a commission’s scope and reorganization-related recommendations must fit within an overall context of legislative-executive consensus.

Potential Alternatives or Complements to a Commission

A CARFA could provide a mechanism for the President and Congress—through the President’s appointees to the commission (under both the House and Senate versions of the CARFA legislation), congressional leaders’ appointees (under the Senate version), and Congress’s consideration of the commission recommendations—to consider “elimination or realignment of duplicative, wasteful, or outdated functions” in certain programs and agencies.¹²⁶ However, establishing a commission is only one possible way of exploring these issues. If Congress wants to explore similar issues, it could consider alternatives or complements to a commission. Three are discussed and analyzed below.

¹²² Ronald C. Moe, *Administrative Renewal: Reorganization Commissions in the 20th Century* (Lanham, MD: University Press of America, 2003), p. 138.

¹²³ See U.S. General Accounting Office, *Executive Reorganization Authority: Balancing Executive and Congressional Roles in Shaping the Federal Government’s Structure*, GAO-03-624T, Apr. 3, 2003, pp. 10-11, in U.S. Congress, House Committee on Government Reform, *Toward a Logical Governing Structure: Restoring Executive Reorganization Authority*, hearing, 108th Cong., 1st sess., Apr. 3, 2003, H.Hrg. 108-33 (Washington: GPO, 2003).

¹²⁴ U.S. National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (Washington: GPO, 2004), ch. 12 and 13.

¹²⁵ For example, see Richard A. Clarke, “Honorable Commission, Toothless Report,” *New York Times*, July 25, 2004, sec. 4, p. 11; and Dana Milbank and Walter Pincus, “Sept. 11 Commission Purposely Avoided Judgments on Iraq War,” *Washington Post*, July 25, 2004, p. A6.

¹²⁶ Quoted excerpt from S. 1155/H.R. 2470 title, as introduced (109th Cong.).

Pursue or Authorize Government Reorganization

Commentators sometimes propose reorganization of government agencies as a way to realign programs and improve government efficiency and effectiveness. Thus, as an alternative or complement to the CARFA legislation, Congress could consider undertaking specific reorganization legislation, as it did with the Homeland Security Act of 2002 (116 Stat. 2287) when it created the Department of Homeland Security, or alternatively, reauthorizing executive reorganization authority.¹²⁷

In the past, reorganization was viewed largely as a technical exercise that could be delegated to experts in the executive branch. In recent decades, however, commentators have seen reorganizations as also having potentially significant institutional, policy, and political consequences.¹²⁸ In 1995, GAO explored many of the associated issues.¹²⁹ In 2003, the Comptroller General recommended streamlining and simplifying the federal government's organizational structure to address "duplicative, overlapping, and conflicting and outdated government programs, policies, and operations."¹³⁰ Furthermore, the National Commission on the Public Service ("Second Volcker Commission") recommended a "fundamental reorganization" of the federal government "into a limited number of mission-related executive departments," in order to enhance "mission coherence and role clarification."¹³¹ According the Second Volcker Commission's proposal, the choice of agency subordinate organizations and personnel systems—traditionally the subject of congressional attention and negotiation—would be defined by the President, and subject to oversight by OMB and the Office of Personnel Management (agencies under control of the President), "as well as Congress."¹³²

The organization design literature has expressed mixed assessments of the ability of reorganization to improve organizational performance. Grouping organizations together can be viewed as a "double-edged sword":

On one hand, grouping eases the flow of information within the boundaries of the group by providing a common language, a common goal, and, indeed, even a common view of the world. The group becomes an identifiable subculture of the larger organization, and the

¹²⁷ This section focuses on the concept of reorganization generally. For more on executive reorganization authority, which expired in 1984 but remains in Title 5 of the *United States Code*, see CRS Report RL30795, *General Management Laws: A Compendium*, entry for "Reorganization Act of 1977, as Amended" in section IV.B. of the report, by Henry B. Hogue; CRS Report RL30876, *The President's Reorganization Authority: Review and Analysis*; and U.S. Congress, House Committee on Government Reform, *Toward a Logical Governing Structure: Restoring Executive Reorganization Authority*.

¹²⁸ CRS Report RL30795, *General Management Laws: A Compendium*, entry for "Reorganization Act of 1977, as Amended."

¹²⁹ For example, see U.S. General Accounting Office, *Government Reorganization: Issues and Principles*, GAO/T-GGD/AIMD-95-166, May 17, 1995, p. 2; and U.S. General Accounting Office, *Government Restructuring: Identifying Potential Duplication in Federal Missions and Approaches*, GAO/T-AIMD-95-161, June 7, 1995. GAO has also concentrated on the potential role of agency and government-wide strategic planning under GPRA (as explained later in this report). For example, see U.S. General Accounting Office, *Results-Oriented Government: Using GPRA to Address 21st Century Challenges*, GAO-03-1166T, Sept. 18, 2003.

¹³⁰ Comptroller General David M. Walker, U.S. General Accounting Office, *Truth and Transparency: The Federal Government's Financial Condition and Fiscal Outlook*, statement presented to the National Press Club, Sept. 17, 2003, p. 6, available at <http://www.gao.gov/cghome/npc917.pdf>.

¹³¹ The commission cited the Department of Homeland Security as a model. See National Commission on the Public Service, *Urgent Business for America: Revitalizing the Federal Government for the 21st Century* (Washington: Brookings Institution, 2003), p. 14, available at <http://www.brookings.edu/gs/cps/volcker/urgentbusinessreport.htm>.

¹³² *Ibid.*, p. 16.

sharing and processing of information become easier. But the boundaries inevitably become barriers, making it more difficult to share information outside the group and often engendering conflict, competition, and a lack of cooperation among groups....

It's essential to keep in mind that organizations, in the final analysis, are political systems with complex patterns of power and influence.... If new grouping patterns seem to elevate one group over another, channel increased resources to a particular activity, or substantially alter reporting relationships, some manager or group will be seen as winning at the expense of someone else.... Strategic grouping ... by definition separates some jobs and individuals at the same time it brings others together.¹³³

It is possible that Congress had similar concerns when enacting the Homeland Security Act, when Congress included Section 888, "Preserving Coast Guard Mission Performance" (116 Stat. 2249), in the bill, which prohibited the Secretary of the Department of Homeland Security (DHS) from substantially or significantly reducing the "non-homeland security missions" of the Coast Guard. Furthermore, in the 108th Congress, S. 910 ("Non-Homeland Security Mission Performance Act of 2003") was reported from committee favorably with amendments, articulating concerns that non-homeland security missions (e.g., maritime search and rescue, fisheries enforcement, asylum for refugees, protecting against counterfeiting, etc.) be preserved and not crowded out by homeland security-related activities.¹³⁴ Similar concerns could apply to other proposed executive branch reorganizations.

Establishing a commission like the CARFA might arguably entail some advantages compared to reorganization, whether that reorganization were undertaken through the regular legislative process or executive reorganization authority. For example, in contrast to reorganization through the regular legislative process, the CARFA legislation would expedite congressional consideration of the commission's recommendations without the risk of amendments undermining the cohesiveness of the package. The CARFA legislation would arguably impose fewer restrictions upon the commission's recommendations compared with executive reorganization authority, which, if renewed, would impose a number of restrictions on what reorganization plans could contain (e.g., a prohibition on abolishing statutory programs). A CARFA would thus have more flexibility to deal with a broad range of policy matters.

Other observers might see disadvantages in the CARFA proposal, compared to reorganization through the regular legislative process or executive reorganization authority. Compared to CARFA, pursuing reorganization (or policy changes) through the regular legislative process could be seen as preserving important congressional prerogatives under the Constitution's separation of powers and checks and balances, subjecting proposals to more deliberation, transparency, and public participation.¹³⁵ In addition, Congress enacted major legislative changes to tax laws in 1986, social policy in 1996, farm subsidies in 1996, and homeland security agencies in 2002 by relying on existing processes and institutions. The CARFA legislation could also be seen as having disadvantages compared to executive branch reorganization authority, if Congress were concerned about giving too much power to the President. Because executive branch

¹³³ See David A. Nadler and Michael L. Tushman, *Competing by Design*, pp. 67, 84, 91. In addition to formal organization, the literature provides two other means of rationalization and coordination, including "structural linking" (e.g., cross-organization planning and implementation teams) and "systems and processes" (strategic planning processes, information technology systems, etc.). See Nadler and Tushman, pp. 67-69.

¹³⁴ U.S. Congress, Senate Committee on Governmental Affairs, *Non-Homeland Security Mission Performance Act of 2003*, report to accompany S. 910, 108th Cong., 1st sess., S.Rept. 108-115 (Washington: GPO, 2003).

¹³⁵ Critics of a proposal like the CARFA Act could point out that Congress has protected these prerogatives before. The Reorganization Act of 1977, as Amended, was allowed to expire after the Supreme Court ruled in *INS v. Chadha* that the legislative veto, a statutory check on executive branch discretion, was unconstitutional (462 U.S. 919 (1983)).

reorganization authority, if renewed, would be subject to many restrictions regarding what the President could propose for expedited congressional consideration, the executive branch's legislative powers would be arguably more constrained under a renewed Reorganization Act than a new CARFA Act.

Use GPRA

Another potential alternative or complement for the CARFA legislation, which Congress might consider, is continued or expanded usage and oversight of the Government Performance and Results Act.¹³⁶ Congress enacted GPRA to accomplish several goals, including to “systematically [hold] Federal agencies accountable for achieving program results”; “improve congressional decisionmaking by providing more objective information on achieving statutory objectives, and on the relative effectiveness and efficiency of Federal programs and spending”; and “improve internal management of the Federal Government.”¹³⁷ Thus, GPRA established a statutory foundation intended for examining issues, among others, that a CARFA would also emphasize.

The extent to which GPRA has been successful in moving toward these goals has been a subject of discussion and debate in Congress and the legislative branch, in the executive branch, in the scholarly community, and among other observers.¹³⁸ Some, including GAO, see GPRA as having established a “solid foundation” of results-oriented planning, measuring, and reporting, albeit with a number of challenges remaining, including an “inadequate focus on addressing issues that cut across federal agencies.”¹³⁹ Others see GPRA at risk of creating a “paper exercise” unless agency program evaluations and performance reporting documents have budget and management implications, and some are concerned about a perceived lack of analytical capacity in federal agencies in order to comply with GPRA and the Bush Administration's PART initiative. Still others might question whether GPRA or its implementation have focused on the right things. Apart from the CARFA legislation, a number of observers have advocated for continued use of the Bush Administration's PART as a complement to GPRA, in order to forge a “link” between performance and budgets.¹⁴⁰ However, some others have criticized the PART for inconsistency, its

¹³⁶ For more information on GPRA, see CRS Report RL30795, *General Management Laws: A Compendium*, entry for “Government Performance and Results Act of 1993” in section III.B. of the report; CRS Report RL32164, *Performance Management and Budgeting in the Federal Government: Brief History and Recent Developments*, by Virginia A. McMurtry; and CRS Report RS20257, *Government Performance and Results Act: Brief History and Implementation Activities*, by Genevieve J. Knezo.

¹³⁷ These come from Section 2(b) of the law, titled “Purposes.”

¹³⁸ See, for example: U.S. Congress, House Committee on Government Reform, Subcommittee on Government Efficiency and Financial Management, *10 Years of GPRA—Results, Demonstrated*, hearing, 108th Cong., 2nd sess., Mar. 31, 2004, H.Hrg. 108-175 (Washington: GPO, 2004); U.S. Congress, House Committee on Government Reform, *What Happened to GPRA? A Retrospective Look at Government Performance and Results*, hearing, 108th Cong., 1st sess., Sept. 18, 2003, H.Hrg. 108-75 (Washington: GPO, 2003); U.S. General Accounting Office, *Results-Oriented Government: GPRA Has Established a Solid Foundation for Achieving Greater Results*, GAO-04-38, Mar. 2004; U.S. Office of Management and Budget, *The President's Management Agenda, FY 2002* (Washington: GPO, 2001), pp. 27-30; Jonathan D. Breul, “The Government Performance and Results Act—10 Years Later,” *Journal of Government Financial Management*, vol. 52, no. 1 (spring 2003), pp. 58-64; and Beryl A. Radin, “Caught Between Agendas: GPRA, Devolution, and Politics,” *International Journal of Public Administration*, vol. 26, nos. 10/11 (Aug./Sept. 2003), p. 1247.

¹³⁹ U.S. General Accounting Office, *Results-Oriented Government: GPRA Has Established a Solid Foundation for Achieving Greater Results*, “Highlights,” inside front cover.

¹⁴⁰ Written statements of Jonathan D. Breul and Maurice P. McTigue, respectively, in U.S. Congress, House Committee on Government Reform, Subcommittee on Government Efficiency and Financial Management, *Should We PART Ways With GPRA*.

emphasis on serving the needs of the executive branch without the significant involvement of Congress and other stakeholders, and its focus on individual programs instead of issues that cut across several agencies (e.g., food safety).¹⁴¹

Proponents of a CARFA might argue that it would bring several advantages compared to using GPRA alone, including (1) producing an integrated and internally consistent set of recommendations for congressional consideration; (2) potentially insulating the commission's deliberations from day-to-day politics, thereby potentially allowing the commissioners more flexibility to investigate controversial options and develop innovative recommendations; (3) potentially establishing some measure of independence for the commission's recommendations, thereby increasing the commission's credibility; and (4) eliminating the ability of Members of Congress to amend the commission's set of recommendations or delay their consideration, thereby increasing the probability of enacting a coherent package.

On the other hand, opponents are likely to see the disadvantages of establishing a commission compared to using GPRA alone, including (1) potential duplication of effort with federal agencies in evaluating programs and agencies; (2) arguably less transparency and participation in formulating and considering proposals compared to the process under GPRA, potentially undermining the commission's credibility; (3) potential questions about the ability of a commission to make credible assessments with limited time and analytical capacity; and (4) eliminating the ability of Members of Congress to amend the commission's recommendations or delay their consideration, thereby facilitating the floor consideration of legislation that might otherwise have stood little chance of enactment had there been opportunity for more scrutiny of commission recommendations.

Bolster Agency Program Evaluation Capacity Through "Chief Program Evaluation Officers"

Congress could also consider bolstering program evaluation capacity in federal agencies as a potential alternative or complement for the CARFA legislation. Many observers have asserted that agencies frequently do not adequately evaluate the performance or results of their programs—or integrate evaluation efforts across agency boundaries—possibly due to lack of capacity, management attention and commitment, or resources.¹⁴² Bolstering the program evaluation capacity at federal agencies could arguably address many of the same issues that a CARFA would address.

If Congress found adequate progress has not been made in evaluating federal programs and agencies, and if Congress deemed these to be serious problems, Congress might establish "chief

¹⁴¹ For more discussion, see CRS Report RL32663, *The Bush Administration's Program Assessment Rating Tool (PART)*.

¹⁴² For example, see the General Accounting Office testimony in U.S. Congress, House Committee on Government Reform, Subcommittee on Government Efficiency and Financial Management, *Performance, Results, and Budget Decisions*, hearing, 108th Cong., 1st sess., Apr. 1, 2003, H.Hrg. 108-32 (Washington: GPO, 2003), pp. 30-31; U.S. General Accounting Office, *Program Evaluation: Agencies Challenged by New Demand for Information on Program Results*, GAO/GGD-98-53, Apr. 1998; and Matthew Weinstock, "Under the Microscope," *Government Executive*, vol. 35, no. 1 (Jan. 2003), pp. 37-40. For more detailed background and analysis, see U.S. General Accounting Office, *Transition Series: Program Evaluation Issues*, GAO/OCG-93-6TR, Dec. 1992; Walter Williams, *Mismanaging America: The Rise of the Anti-Analytic Presidency* (Lawrence, KS: University Press of Kansas, 1990); U.S. General Accounting Office, *Transition Series: Program Evaluation Issues*, GAO/OCG-89-8TR, Nov. 1988; and U.S. General Accounting Office, *Federal Evaluation: Fewer Units, Reduced Resources, Different Studies From 1980*, GAO/PEMD-87-9, Jan. 1987.

program evaluation officer” (CPEO) positions in major agencies to bring more attention to this function. “Chief officer” positions have proliferated in recent years.¹⁴³ Because programs can differ considerably and the field of program evaluation is highly interdisciplinary, evaluation methods differ from program to program.¹⁴⁴ A common theme behind the creation of each of these chief officer positions was many observers’ belief that senior managers within executive branch agencies paid insufficient attention to a given functional perspective (e.g., financial management, information technology) in managing their agencies. Therefore, observers believed that each functional perspective needed to be “elevated” to a higher position within agencies’ management ranks, as a means to ensure that long-standing problems would be addressed.¹⁴⁵

This situation may hold true for the program evaluation function in some agencies. The Comptroller General stated in late 2002 that,

[u]nfortunately, there is reason to be concerned about the capacity of federal agencies to produce evaluations of their programs’ effectiveness. Many program evaluation offices are small, have other responsibilities, and produce only a few effectiveness studies annually. Even where the value of evaluations is recognized, they may not be considered a funding priority.¹⁴⁶

If agency program evaluation staff and organizations struggle for visibility even with regard to their own programs, these units might face an even more difficult task in attempting to look across agencies at crosscutting, overlapping, duplicative, or fragmented program areas.

If Congress chose to establish CPEO positions in major agencies, it might also consider establishing a corresponding interagency council of CPEOs. CPEOs might be tasked to help the agencies ensure quality performance information, evaluate crosscutting programs (in addition to the agency’s indigenous programs), and report findings and information to Congress. Under current law, it is no one’s explicit job to do this coordination.¹⁴⁷

Proponents of pursuing this option, apart from the CARFA legislation, might argue that establishing these chief officer positions could create a “seat at the table” for program evaluation

¹⁴³ For more discussion, see the section entitled “Agency ‘Chief Officers’ and Interagency Councils” in CRS Report RL32388, *General Management Laws: Major Themes and Management Policy Options*, by Clinton T. Brass. Currently, statutory chief officers (or their equivalent) include *inspectors general* (IGs, established by the Inspector General Act of 1978; 92 Stat. 1101); *chief financial officers* (CFOs, established by the Chief Financial Officers Act of 1990; 104 Stat. 2838, at 2842); *chief information officers* (CIOs, established by the Clinger-Cohen Act of 1996; 110 Stat. 679, at 684); *chief human capital officers* (CHCOs, established by the Homeland Security Act of 2002; 116 Stat. 2287); and *chief acquisition officers* (CAOs, established by the Services Acquisition Reform Act of 2003; 117 Stat. 1663, at 1666). *Chief privacy officers* were added to this list with enactment of the Consolidated Appropriations Act, 2005 (Division H, Sec. 522; P.L. 108-447).

¹⁴⁴ The Government Performance and Results Act defines *program evaluation* as “an assessment, through objective measurement and systematic analysis, of the manner and extent to which Federal programs achieve intended results” (107 Stat. 288). More information about the program evaluation field can be found at the website of the American Evaluation Association, available at <http://www.eval.org>.

¹⁴⁵ For example, see GAO’s 1988 analysis recommending the establishment of agency chief financial management officers, U.S. General Accounting Office, *Transition Series: Financial Management Issues*, GAO/OCG-89-7TR, Nov. 1988, pp. 22-23. With regard to establishment of chief acquisition officers, see Jason Peckenpaugh, “Chief acquisition officer proposal wins endorsement,” *GovExec.com*, June 17, 2003, available at <http://www.govexec.com/dailyfed/0603/061703p1.htm>.

¹⁴⁶ U.S. General Accounting Office, *Performance Budgeting: Opportunities and Challenges*, GAO-02-1106T, Sept. 19, 2002, p. 16.

¹⁴⁷ However, for other functional areas, Presidents William Clinton and George W. Bush both have used interagency councils of “chief officers,” viz., the CFO Council and CIO Council, to undertake complex initiatives and foster interagency collaboration.

in agency senior management teams, potentially helping agencies to improve performance or coordinate programs with overlapping missions. However, critics might argue that establishing another type of chief officer would be excessive for agency leaders and management teams. If this option were viewed in context with the CARFA legislation as an alternative or complement, it could be seen by observers as bringing potential advantages or disadvantages. For example, some might see bolstered agency program evaluation efforts as an essential complement for a CARFA. A commission could then draw upon the work of program evaluation units and officers in federal agencies.¹⁴⁸ On the other hand, some observers might see a CARFA as essentially duplicative of the agency CPEOs and unaccountable to Congress.

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¹⁴⁸ For example, the first Hoover Commission's Concluding Report commented that time limitations, given the level of resources at the commission's disposal, constrained the breadth and depth of the commission's activities:

Limitations of time made it manifestly impossible for this Commission to inspect all the activities of the Government. Thus, in the early stages of planning, our attention was directed upon the largest spending activities of the Government with the expectation that these functions would provide the most fruitful ground for economy and savings. As a result, some smaller agencies either were not surveyed at all, were partially studied, or were considered only from the standpoint of how they might be related to the executive structure as a whole.

Our exclusion of these agencies does not imply that their operations should not also be carefully appraised. On the contrary, our own findings offer clear evidence of the value of further continuing study into the remaining relatively untouched areas of the Government.

In our opinion, the logical course would be to assign this task to both the Office of the Budget and to the departments themselves. Through their management research staffs they would appear to be best equipped to do the job on a continuing basis.

(See Commission on Organization of the Executive Branch of the Government, *Concluding Report*, pp. 45-46.)